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No. 287.

In the Supreme Court
of the United States
OCTOBER TERM, 1931

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY et al., *Appellants*,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION et al., *Appellees*.

BRIEF OF APPELLEE,

The Public Service Commission for the State of Kansas, J. W. Greenleaf and Thurman Hill, Members.

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STATEMENT.

The opinion of the court below (R. 698) will be found in 51 Fed. (2d) 510.

1. The Public Service Commission for the State of Kansas.

The Public Service Commission for the state of Kansas is a public corporation and administrative tribunal under the laws of the state of Kansas. It is the duty of the Commission to regulate the rates of all common carriers by railroad applicable to the movement of intrastate traffic within the state and to proceed in the manner prescribed by law to fix and establish such rates upon a just and reasonable basis. The Commission is by statute authorized and directed to appear before the Interstate Commerce Commission

in proceedings affecting the interests of the people of Kansas, to bring complaints of violations of the interstate commerce act, and otherwise to secure for the people of Kansas just, reasonable, and lawful interstate rates.

The interstate rates on grain and grain products in the said state bear an important relation to rates on the same commodities moving in intrastate commerce within the state, and the level of interstate rates will in a large measure control the Commission in the fixing and determining of reasonable and lawful intrastate rates upon the same commodities.

In pursuance of the terms of section 13 (3) of the interstate commerce act, the Interstate Commerce Commission availed itself of the services, records, and facilities of the Kansas Commission, and that Commission by and through its duly authorized commissioners and representatives attended the hearings had in the investigation upon grain and grain products from the time the investigation was started until ended.

The production of grain and grain products within the state of Kansas is a basic industry of the state. In accordance with the record before the Interstate Commerce Commission the average annual movement of winter wheat originating in the state is one hundred and fifty million bushels, approximately one-fifth of the annual average production within the United States.

2. The Proceedings Before the Interstate Commerce Commission.

This is an appeal from a decision of the district court refusing to enjoin an order of the Interstate Commerce Commission made and entered July 1, 1930, as modified by a supplemental order made and entered April 10, 1931, in a proceeding entitled "Grain and Grain Products Within the Western District and for Export," No. 17,000, Part 7 (R. 69 to 326).

By an order made and entered on March 12, 1925, (R. 15 to 49) the Commission instituted of its own motion an investigation of the rate structure of common carriers subject to the interstate commerce act, pursuant to a resolution of congress, approved January 30, 1925 (43 Stat. L. 801), commonly referred to as the Hoch-Smith resolution. The proceedings under review are designated Part 7 of this general investigation and involve all the rates for the transportation of grain and grain products between points in the Western District and from all points in the United States to the several ports for export. There were pending at the time a number of formal complaints of various parties brought under the interstate commerce act, some thirteen in all, which had not as yet been heard and which were, by notice dated December 30, 1926, assigned for hearing with No. 17,000, Part 7 (R. 57 to 68). Later, other pending formal complaints which had advanced beyond the point of hearing were consolidated with No. 17,000, Part 7, and the report and order herein determine all such other proceedings.

While the investigation was instituted in compliance with the Hoch-Smith resolution, the inquiry was into any "violation of any provision of law, including the joint resolution aforesaid" (R. 47).

Hearings in the investigation began at Dallas, Tex., May 9, 1927, and later hearings were held at Wichita, Kan., Minneapolis, Minn., Chicago, Ill., Seattle, Wash., Portland, Ore., and Los Angeles, Cal., the record being closed on September 22, 1928. In all, the hearings occupied a period of several months, and the transcript of testimony was in excess of 53,000 pages, together with more than 2,100 exhibits of documentary material (R. 147).

A large number of interests entered appearances in the proceeding as shown on pages 620 to 625, inclusive, of the Commission's report (R. 70 to 75), and the issues were numerous and varied, embracing three score and more of major issues (p. 697 of report,

R. 147), which implies a much larger number of issues of less importance.

The Commission served upon the parties, on April 20, 1929, a report proposed by two of its examiners, and thereafter, on May 27, 1929, entered upon a hearing of oral argument of the parties lasting for three weeks. The briefs, exceptions and other written argument amounted to more than 20,000 printed pages (p. 697, R. 147).

The investigation was formally instituted as provided by section 13 of the interestate commerce act, a full hearing was had as required by said section, and the Commission on July 1, 1930, made and entered its report and order, finding the existing rates to be unjust, unreasonable, and excessive and in their relation to each other unduly prejudicial and unjustly preferential, and required the carriers, in lieu of the existing rates so found to be unlawful, to cease and desist from maintaining and charging such rates and to establish, on or before October 1, 1930, and put in force and thereafter maintain just and reasonable rates and rates otherwise lawful. The prescribed rates in some instances were higher and in other instances lower than the then existing rates.

Thereafter, upon successive petitions of the defendant carriers, the effective date of the order was postponed to January 1, 1931, then to April 1, 1931, and finally to June 1, 1931. In the meantime the Commission had, on April 10, 1931, issued its supplemental report and order requiring the rates as therein modified to become effective on said date of June 1, 1931.

Pending its consideration of the case, the district court stayed the order of the Commission for sixty days, but upon rendering its decision denied the relief prayed for by appellant carriers and dismissed their bill, from which decision this appeal was brought.

3. Preliminary View of the Case as a Whole.

Before taking up the carriers' presentation in detail we should like to present a brief view of the case as a whole.

Perhaps the best answer to the contentions of the appellant carriers in this case is the report of the Commission itself. It seems to us more calm and guarded in tone than the statements of the carriers. We believe that a perusal of the Commission's report will go far to satisfy the mind of the court that the matters brought by the carriers to its attention in this proceeding have been magnified into undue importance in view of the great and fundamental questions with which the Commission was confronted in its undertaking of a revision of the grain rates in the immense territorial expanse involved. The language of the Commission's report is characterized by the brevity, precision and condensation which should prevail in the decisions of administrative and judicial tribunals when they are dealing with issues and principles of overshadowing magnitude, and where a single sentence in the opinion expresses a conclusion requiring perhaps weeks of careful analysis and reflection upon the facts and conditions involved. The report of the Commission in this case is in itself revelatory of long and profound thought by the Commission on the issues and the immense record confronting it in its investigation of the rates and practices relating to grain and grain products. The reference by the carriers to certain expressions of individual commissioners in their remarks supplementary to the main report should not be allowed to obscure the masterly treatment of the issues to be found in the decision itself, in which the members of the tribunal unanimously concurred.

The carriers in their petition and brief emphasize their conviction that the new rates and practices prescribed by the report will result in the annual loss of revenue to the railroads of from $15,000,000 to $20,000,000 on the grain traffic. This fear colors and

constitutes the background for all of the contentions advanced by the carriers in this proceeding to enjoin the order of the Commission. It is true that $15,000,000 or $20,000,000 is a considerable sum of money, and the carriers are justified in giving it attention. This amount of revenue is, however, relative and should be accorded only its due proportionate significance. In the brief of the carriers it is said that this $20,000,000 represents about 13 per cent of their revenue on grain and grain products and that their revenue on grain and grain products represents about 12.1 per cent of their aggregate revenues on all traffic. From these base figures it may readily be calculated that the total revenues which the carriers say they receive annually on grain and grain products is approximately $153,800,000, and their total annual revenues on all freight traffic approximately $1,271,000,000.

In the year 1924, instanced by the appellants, the total revenues of these carriers derived from all operations, including other than freight service, were $2,231,208,135. (Statistics of Railways, Interstate Commerce Commission, 1924). Appellants have therefore founded their contention as to the alleged radical action of the Commission on the asserted fact that the effect of its report and order is to subtract $20,000,000 annually from a gross revenue of $2,231,208,135. The foregoing figures will, we suggest, aid the court in placing in proper perspective the revenue effects of the Commission's order which the carriers presented with such manifestations of alarm.

Furthermore, the Commission, while it expresses its anticipation that the rates prescribed will result in reductions in the revenues of the carriers, says in its report that in its view it is not possible to determine with precision what the revenue effects of its order will be, and that the results can only be known after a reasonable trial of the new rates. We submit that the carriers are not war-

ranted in representing at this time to the court that the alleged annual reduction of $20,000,000 in their grain revenues will mean an equivalent reduction in their net income, for it is a well-known principle both in transportation and in business generally that net income does not ordinarily vary in direct proportion to changes in gross earnings. The necessity and duty of an increased efficiency in management and in economies of operation are vital factors to be considered where changed economic conditions and reversals of economic trends in a new era of business and transportation call for the revision of freight rates in harmony with what the traffic can reasonably, justly and practically bear.

The facts and information brought to the attention of this court reveal that under direction of a resolution of congress the Commission has for some years been engaged and still continues to be engaged in a general investigation and revision of freight rates in this country on classes and commodities. In its report and order in the grain case it is found that grain and grain products are contributing somewhat more than their just share to the general revenues of the carriers, and it has prescribed rates which the carriers say will reduce their gross revenues by a subtraction of $20,000,000 from $2,231,208,135. Certainly this is on its face a most temperate exercise of the discretion of the Commission in reallocating the revenues of the carriers on the numerous products which they transport. As a matter of first impression and basic presumption the court is clearly called upon to assume that there has been no abuse of discretion by the Commission through its action in the grain case.

The carriers complain of the brevity of the discussion in the report of evidence which they deemed pertinent to their interests. The report in the case at bar occupies with respect to the main opinion 80 pages, with respect to the separate opinions of the com-

missioners 48 pages, and in addition 75 pages of material in the appendices thereto, making 203 pages in all. We ask the court to compare this with the decision of the Commission granting general increases to the carriers in *Increased Rates, 1920,* 58 I. C. C. 220, where the Commission granted horizontal increases on all classes and commodities for the entire country of 40 per cent in the eastern group; 25 per cent in the southern group; 35 per cent in the western group, and 25 per cent in the Mountain-Pacific group, and 20 per cent in passenger rates and fares everywhere, in a report the main opinion of which occupied only 36 pages and the separate opinions of the commissioners 5 pages, making only 41 pages in all. These increases amounted to hundreds of millions of dollars annually. Inasmuch as the latter case involved increases to the carriers, the principal discussion, brief as it was, in the report, related to the evidence of the carriers. In the case at bar a great part of the evidence was presented by parties other than the carriers, and it is but natural that the Commission should devote a major part of its discussion to that evidence. The brevity of the report in *Increased Rates, 1920,* discloses a situation which always confronts the Commission where it is dealing with an entire rate structure over a large territorial domain. It has to deal with great underlying conditions which are general in nature. In so doing the promulgation of a single conception may dispose of a large section of the case. Fundamental principles necessarily are all-inclusive, and they cannot be stated with clearness except in language of brevity and precision. Indeed, a case before the Commission dealing with a small territorial area and with one commodity, such as coal or oil, may require a more extensive report than one of national scope, inasmuch as the Commissioner in the former is called upon to consider a mass of detail in fitting particular rates into the existing general adjustments, whereas in a case like the one at

bar it has all the grain rates before it, no part of the structure stands as a criterion, and it is obliged to consider transportation and economic principles basically and in the abstract in such a way as to call for the application of the broadest and at the same time the simplest of governing principles. In view of the foregoing we submit that in the case at bar the Commission dealt with ample and unusual fullness with the record before it.

Pursuing the same thought, we direct the attention of the court to the decision of the Commission in *Reduced Rates, 1922*, 68 I. C. C. 676, which ordered a general cut of 10 per cent in rates throughout the country, entailing total reductions in revenue many times exceeding the amount of reductions in the case at bar. The opinion is only 71 pages in length.

In *Rates on Grain, Grain Products and Hay*, 64 I. C. C. 85, to which the carriers have referred, the Commission ordered a general reduction of rates in the Western and Mountain-Pacific groups in a report occupying only 21 pages.

In an equity proceeding like the one at bar the pleadings must necessarily be somewhat liberal and nontechnical to serve the ends of justice on account of the unusual complexity of the matters in issue. There was ample opportunity open, therefore, in the case at bar for the carriers in their bill to set out all their alleged grievances. The carriers complain of an absence of adequate discussion by the Commission of evidence and grounds relating to reductions in the grain rates. But their bill and brief are remarkably silent as to the general content or lines of evidence introduced of record in their behalf which the Commission is alleged to have failed to analyze and weigh in its report. True, they complain that the Commission refused, after a most exhaustive investigation, to reopen the case for further hearing in response to their appeals so to do, but they do not assert any lack of time or opportunity to pre-

sent their proof and contentions during the long course of the hearings. We do not mean to intimate that the record is lacking in evidence as to the financial status of the carriers and the facts regarding their revenues, but both the bill and the briefs are almost silent with respect to any allegations or contentions thereupon, and we think are lacking in essentials necessary to support the charge of an alleged failure of the Commission to cover in its reports the evidence and the grounds underlying its decision.

POINTS AND AUTHORITIES.

I.

The courts will not disturb decisions of the Interstate Commerce Commission made within its constitutional and statutory jurisdiction and authority upon substantial and competent evidence and rendered pursuant to the exercise of its administrative discretion, unless it is made clearly evident that the Commission abused its discretion or materially misinterpreted or misapplied the law in the discharge of its functions and duties.

Ann Arbor R. Co. v. Fellows, 236 Fed. 387, 390.
Baer Bro. Mercantile Co. v. Denver & Rio Grande Railroad Company, 233 U. S. 479, 486.
Chicago I. & L. R. Co. v. United States, 270 U. S. 287.
Interstate Commerce Commission v. A. M. Ry. Co., 168 U. S. 144.
Interstate Commerce Commission v. Goodrich Transit Co., 224 U. S. 194, 215.
Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 470.
Interstate Commerce Commission v. Union P. R. R. Co., 222 U. S. 541.
Kansas City Southern Railway Company v. United States, 231 U. S. 423, 443.
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Louisville & Nashville R. R. Co. v. United States, 245 U. S. 463, 466.
Manufacturers Ry. Co. v. United States, 246 U. S. 457, 481.
New England Division Case, 261 U. S. 184.
Pennsylvania Co. v. United States, 236 U. S. 351, 361.
Prentis v. Atlantic Coast Line Co., 211 U. S. 210, 226.
The Minnesota Rate Cases, 230 U. S. 352, 433.
United States v. New River Co., 265 U. S. 533.
Virginian R. Co. v. United States, 272 U. S. 658.

II.

There is nothing in the sworn petition, exhibits or affidavits of the appellants or in the answers of other parties, or in the main opinion or order of the Commission, or in the separate and concurring opinions of individual commissioners, or in the aura of facts and circumstances surrounding the action of the Commission involved, or in any other part of the record before this court to support or warrant an inference that the Commission in its decision under review abused its discretion or misinterpreted, misapplied, ignored, or disregarded any of its legal powers, duties, or functions in disposing of the issues embraced in its investigation of the rate structure on grain and grain products.

SUMMARY OF ARGUMENT.

I. The courts will not set aside rate decisions of the Interstate Commerce Commission based upon sufficient evidence, unless it appears that the Commission abused its discretion, or exceeded its jurisdiction, or was misled by erroneous theories as to its legal powers and duties.

II. The record before the court affords no proof that the Commission abused its discretion, or misconceived or misapplied its legal powers, or that it disregarded any of its legal duties in reaching its decision in the case under review.

1. The mere ordering of reductions in a substantial body of the rates on grain and grain products affords no indication that the Commission failed to give due weight to the fair net return provision of section 15*a*.

2. The fair net return provision in section 15*a* does not supplant or submerge but simply supplements and enlarges the standards of reasonableness already obtaining under section 1.

3. As a matter of inherent impossibility, the forces of economics and trade cannot be withstood or their effects overcome by the Commission through the exercise of its simple legal power to fix rates, so as to produce the allotted net return to the carriers under fundamentally adverse circumstances and conditions.

4. The Commission is not a mere calculator of the net return, but is charged with employing its flexible discretion in weighing and balancing all the factors and standards of reasonableness obtaining under section 1 as well as under section 15*a*.

5. The value of the commodity, the worth of the service to the shippers, and other factors under section 1 are criteria to

be given equal weight with the fair return provision under section 15*a* in determining the reasonableness of rates.

6. The Commission did not engage, as appellants assume, in moving rates up and down within the "zone of reasonableness" under the alleged baneful influence of the Hoch-Smith resolution, but what it did do was to find certain rates unreasonable under section 1 and to prescribe reasonable rates for the future under that section on a precise and definite level.

7. The separate and concurring opinions of commissioners do not reveal the presence of any substantially erroneous legal conceptions either therein or in the main report or order.

8. Neither previous decisions on grain rates nor contemporaneous or subsequent decisions of the Commission on other matters can or do afford any basis for the contention of appellants that the mind of the Commission was clouded with legal error in making the decision under review.

9. Granting or refusing petitions for rehearing rests in the sound discretion of the Commission, and it did not abuse its discretion in denying the petitions of appellants for rehearing in the case at bar.

10. There is no basis for upholding the assertion of appellants that the Commission acted upon material data outside the record.

ARGUMENT.

There is nothing in the sworn petition, exhibits or affidavits of the appellants or in the answers of other parties, or in the main opinion or order of the Commission, or in the separate and concurring opinions of individual commissioners, or in the aura of facts and circumstances surrounding the action of the Commission involved, or in any other part of the record before this court to support or warrant an inference that the Commission in its decision under review abused its discretion or misinterpreted, misapplied, ignored, or disregarded any of its legal powers, duties, or functions in disposing of the issues embraced in its investigation of the rate structure on grain and grain products.

No serious dispute apparently exists between the parties as to the correctness of the proposition set forth in division I of our "Points and Authorities." We shall, therefore, devote ourselves for the most part to division II.

No Legal Error or Abuse of Discretion May be Imputed to the Commission from the Mere Fact that Rate Reductions Were Made When the Carriers Were Not Receiving the Assigned Net Return.

The carriers contend that the Commission in reaching its decision acted under erroneous legal conceptions of its powers and duties. The court is asked to draw the same inference. Certain facts and circumstances are brought forward by the carriers as purporting to warrant this inference. Among them is an expression in the main decision itself and especially certain remarks in the separate opinions of some of the commissioners. Appellants refer, also, to views ex-

pressed by the Commission in other decisions made prior to or about the same time as the grain case. But one cannot read the briefs of the appellants filed here and in the district court without perceiving that there is a dominant thought in the mind of the carriers upon which they base their assertion that the Commission proceeded upon unsound legal principles and theories. The persistent and repeated emphasis of this idea by the carriers shows that it overshadows all others upon which they rely. It is this: That the Commission has subjected itself to the strongest suspicion of having committed legal error by the bare fact that it reduced rates on leading articles of commerce over a wide area when the carriers were realizing less than the allotted net return. This circumstance is introduced and magnified by the appellants in such a way as to make it constitute the main atmosphere and background of their entire presentation herein. In the case at bar the prime task of this court is to examine the mind of the Commission as it operated in the grain case and to determine whether it was so aberrated or confused by legal error as to preclude its normal and lawful functioning in the decision of the matters before it. This court has expressly held that it is not concerned with the *results* of the Commission's decisions so long as it keeps within its powers and duties and proceeds upon sound legal principles (*Virginia R. Co. v. United States*, 272 U. S. 658.) Nevertheless the carriers elevate a single *result* of the present decision into supreme prominence and insist that the mind of the Commission must be presumed to be permeated with legal error by reason of the rate reductions themselves made in the absence of the net return.

In *Virginian Railway v. United States*, supra, the supreme court of the United States, on page 665, says:

"This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other procedings before it."

It follows that the mere action of the Commission in reducing some of the grain rates should not be taken as any indication whatever by which to judge the correctness or incorrectness of its conceptions as to the nature or extent of its legal duties and powers. (*New England Division Case*, 261 U. S. 184; *United States v. New River Co.*, 265 U. S. 533; *Chicago I. & L. R. Co. v. United States*, 270 U. S. 287.) Nor is this altered by the fact that the carriers were at the time, and for a decade past had been, failing to receive the net return.

"Ignoring" Section 15a.

The attention of the court is invited to some typical phrases employed by appellants in pressing their contention that the Commission rendered its decision under a misconception of its legal powers and duties.

We quote herein from the briefs of appellants filed both in the district court and the supreme court in order that the theory on which their suit was instituted and pressed below, and the extent to which such theory has been adhered to or qualified above, may be observed.

On page 40 of their brief in the district court the carriers say that the Commission may not "disregard or ignore section 15*a*." On page 12 of their reply brief in the district court the carriers affirm that "section 15*a* must be taken into consideration by the Commission" in a case of the character of the grain case. On page 13 they argue the "extent to which the Commission may disregard the requirements of section 15*a*" and the extent to which it "may disregard the net return of the carriers." On page 14 they emphasize that the Commission is "required to give consideration to section 15*a*."

Similar expressions are repeated in the brief of the carriers in the supreme court. (See, for example, pages 74 to 81.)

What do the carriers mean when they say the Commission "disregarded" or "ignored" or failed to "take into consideration" the

requirements of section 15*a*? What did this ignoring and disregarding and failure to take into consideration consist of? Do the carriers mean to intimate that in deciding the grain case section 15*a* did not enter the consciousness of the Commission? Would the carriers have this court understand that the Commission gave no serious thought to the provision in section 15*a* covering the fair net return? The report of the Commission shows and the Commission expressly declares that it did consider and weigh all sections of the act, including the fair return provision in section 15*a*. To affirm, therefore, that the Commission "disregarded" or "ignored" or failed to "take into consideration" the provision of section 15*a* is not enlightening to the court until it clearly appears what the content and implications of these phrases are as they are employed by the appellants in this case. When one reads the briefs of the carriers with this query in mind and reflects upon the central implication of these terms as applied by the carriers, it becomes perfectly clear that the heart and substance of their complaint in this respect is that the Commission "ignored," "disregarded" and "failed to take into consideration" the provision of section 15*a* because they ordered reductions on rates at a time when the carriers were not receiving and had not been receiving the allotted net return. To "regard" or "consider" section 15*a* means in the view of the carriers that the new factor of reasonableness added by that section must be given preëminence and must be made to override all those fundamental preëxisting and long-established standards of reasonableness embraced in section 1. The failure of the carriers to realize the allotted net return in the past may have weighed ever so heavily (as indeed the report clearly shows it did weigh) upon the mind of the Commission; other traffic, transportation, and economic conditions militating in favor of rate reductions upon grain and grain products may have confronted the Commission in ever so impressive array;

a record of over 2,100 exhibits and over 55,000 pages of transcript, portraying circumstances and conditions of the greatest complexity, may have indicated to the Commission ever so strongly that certain of the rates must come down; the anxiety of the Commission (as disclosed in the report) to preserve the future revenues of the carriers may have been ever so earnest and sincere. Such obstacles and forces moult no feather with the carriers. They were not realizing the net return. That was enough. The Commission had no discretion to consider anything else. It did not embrace the net return provision in section 15*a* as all-transcending and supreme, and the Commission is therefore, in the view of the carriers, to be placed by this court under the imputation that it "disregarded," "ignored," and "failed to give consideration" to section 15*a*. True, in this connection the carriers complain of certain expressions in the main opinion and in the separate opinions accompanying the Commission's order, which will receive our attention later herein, but we believe that the court will not fail to perceive in its reading of the brief of the appellants that the assertion of the carriers that the Commission ignored and disregarded section 15*a* has no real depth or substance except as founded on the simple assumption that under section 15*a* the Commission may not substantially reduce rates on a leading commodity over an extensive territory when the carriers as a group or as groups therein are failing to receive the desired and allotted net return on their property devoted to transportation use. The discretion of the Commission to consider and balance all factors of reasonableness and to give each (including the revenue factor) its appropriate weight is, in the view of the carriers, to be deemed as abrogated and destroyed. The revenue factor is not only to be supreme but in the absence of the net return is to be treated only by rate increases or the preservation of existing rates and never by rate reductions, and this despite the holding of the

supreme court that rate increases may under certain circumstances and conditions result in the diminution rather than in the enlargement of the revenues of the carriers, as expressed in *Florida v. United States*, 282 U. S. 194 at page 214, where this court said:

"The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage."

The central contention of appellant common carriers in this case is, therefore, that the Interstate Commerce Commission in its decision now under review both misconstrued and ignored paragraph 2 of section 15*a* of the interstate commerce act, reading as follows:

"(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sections of the country." (U. S. Code, title 49, sec. 15a; 41 Stat. L. 488.)

The argument advanced by the carriers is to the effect that under section 15*a* the Commission cannot, without subjecting itself to the reproach that its mind and acts are infected with legal error, under any circumstances or conditions reduce all or a substantial part of the rates on a commodity moving in large volume over a widespread division or area of the country, if it appears that the carriers as a group or as groups are at the time failing to earn an aggregate annual net railway operating income equal to a fair return (now fixed by the Commission as 5¾ per cent) upon the value of the rail-

way property held for and used in the service of transportation. The carriers estimate that the reductions in the grain rates prescribed by the Commission will result in a decrease of about $20,000,000 annually in their revenues. Elsewhere herein we point out that in the year 1924, instanced by the carriers, the gross revenue on all traffic of the carriers in the territory involved was approximately $1,271,000,000, and their total revenues dervied from all operations, including other than freight service, were $2,231,208,135. Twenty million dollars is less than 1 per cent of $2,231,208,135. The carriers in effect say, therefore, that the legal duty of the Commission under section 15*a* to bring about the allotted fair return to the carriers is so absolute, inflexible, and supreme over other considerations, that if, under the multitudinous circumstances and conditions revealed in a record consisting of over 2,100 exhibits and over 55,000 pages of transcript, it shall prescribe rate reductions on any commodity which the *carriers calculate* may reduce their total annual revenues by less than 1 per cent, the Commission may be brought into court and from this fact alone be placed under the imputation that it has misconstrued its legal powers and both affirmatively and negatively violated the law in the performance of its functions.

True, the appellants in their briefs work up gradually to this bold proposition. They first dwell upon certain alleged legal errors and misconceptions said by them to be present and evident in the composite mind of the Commission as a whole and in the individual minds of some of the commissioners separately. They stress the alleged vitiating influences which they conceive the Hoch-Smith resolution to have had upon the Commission collectively and upon its members individually. These are, however, only preliminaries to their main contention, which they emphasize in their briefs filed both in this court and the lower court. On page 40 of their brief in the district court, the carriers say:

"If, despite the requirements of section 15*a* and at a time when the carriers are receiving far less than the rate of return contemplated thereby, the Commission may reduce by from 10 to 13 per cent all of the rates on grain and grain products from which 12.1 per cent of the aggregate revenues are derived, it may by the same token make similar reductions in the rates on all other major descriptions of traffic and thus not only prevent the carriers from ever receiving the fair rate of return contemplated by the statute but materially reduce revenues already altogether inadequate thereunder."

The same contention in varied language is found throughout the brief of the carriers in the supreme court.

The foregoing language leaves no doubt as to the meaning of the carriers when they say that the Commission "ignored" section 15*a*. The essence of their complaint is that the Commission made widespread reductions in the rates on the important traffic of grain and grain products at a time when the carriers were not realizing the allotted net return. The reductions themselves under such circumstances constitute, in the view of the carriers, proof that the Commission "disregarded" and "ignored" section 15*a*. True, the carriers dwell upon alleged errors of the Commission in interpreting and applying the Hoch-Smith resolution. They magnify certain language and expressions employed by individual commissioners in their separate and concurring opinions, which the carriers affirm to be indicative of the presence of unsound legal views and conceptions. But these arguments, after all, serve only as background and atmosphere for the main thesis of the appellants in this case, namely, that the Commission is shown to have erred by reason of the simple fact that it did reduce a substantial body of rates when the railroads were not receiving the contemplated net return. The Commission in its report expressly affirms that it did give due consideration to section 15*a*. The carriers in their search for error center upon the *result* of the order. The *result*, they say, was to

reduce rates extensively when the net return was not being realized. Let the main thesis of the carriers be, therefore, stripped down to its essence, and let it be clearly apprehended that what the appellants contend is that section 15*a* forbids the Commission to order substantial rate decreases on any commodity moving in large volume over an extensive area if the allotted net return is not being realized, for if, from the fact of such reductions being made, the inference may be drawn that the Commission is neglecting or violating its legal powers and duties, then the effect is to forbid it under any circumstances so to reduce rates where the allotted return has not been forthcoming.

The Alleged Transcendency of Section 15a, as Portrayed by the Carriers.

As a part of their main thesis the appellant carriers also contend that section 15*a* overtops all other sections of the interstate commerce act. Again we refer to briefs of appellants filed both below and here in order that the whole tenor of their presentation may be observed. On page 40 of the brief in the district court they affirm that section 15*a*—

"is the keynote of the whole scheme of rate regulation embodied in the interstate commerce act as it now reads."

On page 16 of the same brief we read:

"This section (15*a*) is the corner stone of the existing system of regulation as created by congress."

On page 28 of their brief in the supreme court we observe the carriers saying that section 15*a*—

"qualifies *and controls* the powers, which may be exercised under sections 1 and 15." (Italics ours.)

On page 90 of the same brief appellants affirm:

"The reasonableness of the rates imposed is to be determined *primarily* by a consideration of the relation between the resulting net revenue and the value of the property." (Italics ours.)

On page 25 of their brief in the district court appellants say:

"It appears from the face of the report that the carriers' rate of return during the period considered by the Commission was far below the standard prescribed by section 15*a* to govern the action of the Commission in the exercise of its regulatory power."

The words "to govern the action of the Commission" clearly reveal the view of the appellants that the provision of section 15*a* in question is not to be regarded as simply introducing a new factor and an additional criterion of reasonableness, but it is to rise supreme over and to supersede all other factors, criteria, and standards prevailing before its enactment, for "to govern" is to rule, to dominate, to control, and to brook the interplay and effects of no other mollifying or mediating elements or considerations.

Section 15*a*, relating to the fair return upon the value of the property of the carriers, was enacted in the transportation act effective February 28, 1920. In their bill and briefs the carriers point out that from such date to the present the carriers as a whole have never earned the return of 5¾ per cent fixed by the Commission on the value of their property, and in this connection they quote from page 627 of the report of the Commission (164 I. C. C. 619, Rec. 77) in the grain decision now under review as follows:

"*Financial Condition of Carriers in the Western District.* The percentage rates of return of Class I carriers in the Western District, by regions, for the calendar years 1921-'28 were as follows:

	REGIONS			
	Northwestern.	Central western.	Southwestern.	Western District.
1921	1.42	4.45	3.17	3.12
1922	2.78	4.07	3.27	3.45
1923	3.45	4.50	3.65	3.96
1924	3.12	4.21	4.34	3.87
1925	3.60	4.41	4.37	4.13
1926	3.83	4.86	4.56	4.45
1927	3.40	4.28	3.98	3.92
1928	4.04	4.59	4.32	4.35

"The above percentages are computed on the investment of the carriers, as shown by their books, including materials and supplies and cash as of the beginning of the year."

The Theory of the Carriers as a Repudiation of the Commission's Work in the Last Decade.

From the foregoing it will be noted that the carriers as a whole or by groups have not secured the allotted return in any year since 1920 up to and including 1928 either in the country as a whole or in any of the four principal regions or districts. The record herein establishes the same fact to be true up to the time of the hearing, in May, 1931, of this case in the district court. Under the interpretation of section 15*a*, as promulgated by the carriers herein, they say in effect that the Interstate Commerce Commission since 1920 has been open to the imputation of being constantly derelict in its duty to prescribe rates for the country as a whole and for each of the principal regions or districts thereof in conformity with the provisions of that section. In *Increased Rates, 1920,* 58 I. C. C. 220, the Commission ordered, effective August 26, 1920, advances in general freight rates ranging in the several regions from 25 to 40 per cent, the said increases being made, however, with respect to certain commodities by the use of specific advances in cents per hundred or per ton. These increases did not bring about the allotted return. The theory of the carriers herein places the Commission under the charge that it failed in such case to perform its legal duty under section 15*a*. Effective July 1, 1922, the Commission ordered a 10 per cent reduction in freight rates applicable generally throughout the United States, as embodied in *Reduced Rates, 1922,* 68 I. C. C. 676. The theory of the carriers herein would severely impugn the action of the Commission in making a widespread reduction of rates on July 1, 1922, in the face of their failure since 1920 to realize the allotted return. In its decision of October 20, 1921, in *Rates on Grain, Grain Products and Hay,* 64 I. C. C. 85, the Commission gave special treatment to grain, grain products and hay several months in advance of the general 10 per cent reduction of July 1, 1922, already mentioned, and over a widespread

area in the Western and Mountain-Pacific groups prescribed substantial decreases applicable on these particular commodities at a time when the carriers were not earning the allotted return on the value of their property. In the case at bar the appellant carriers affirm that the soundness of the Commission's conceptions of its legal powers and duties is open to question and suspicion, if under section 15*a* it orders substantial reductions over a large area or region on a basic commodity moving in extensive volume where the carriers are not securing the assigned percentage of return on the value of their property. Under the theory advanced herein by the carriers the Commission therefore again violated its legal duty in its decision in the hay and grain case of October 20, 1921, above referred to.

In the decade intervening since the passage of section 15*a*, in 1920, the Commission has ordered in other instances substantial reductions in rates for widespread territorial application.

The appellants assert in effect that one of the most important and powerful of governmental institutions has for a decade been misconceiving and misapplying a major section of the interstate commerce act, in that the Commission has failed to follow a theory of interpretation of that section of the statute which the appellant carriers are now solemnly bringing forward in their efforts to set aside and nullify the order of the Commission under review herein. If indeed the Commission has for all these years been under an erroneous conception and has been repeatedly making the egregious legal blunders imputed to it by the carriers herein, it of course falls within the duty and province of this court to arrest this tendency and action of the Commission and, to direct its feet into the true paths of procedure and conduct. But this appellee respectfully suggests that a theory of the carriers involving such implications and entailing such consequences, and now prominently put forth for the

first time, should receive from this court the closest analysis and severest scrutiny.

Earnings of Important Grain Carrying Lines in Excess of 5.75 Per Cent.

It should be noticed in passing, however, that not all the individual grain carriers were failing to realize the net return.

The Commission shows in its report (p. 627, R. 77) that the percentage rates of return of Class I carriers in the Western District, as a group, for the calendar years 1921 to 1928 range from 3.12 per cent in 1921 to 4.45 per cent in 1926, and in no year amounted to 5.75 per cent, the figure fixed by the Commission in *Reduced Rates, 1922*, pursuant to section 15*a*, as the fair rate of return under the provisions of that section. The percentages referred to, as stated, are for the Western District carriers *as a group*. In other words, they are average figures, from which it follows that some of the appellant carriers must have earned less and others earned more than the averages. To what extent certain carriers may have, in certain years, earned in excess of the 5.75 per cent rate does not appear. Such carriers, however, are here asking relief from the Commission's order as well as those carriers whose earnings are less than the average reported.

In the record before the Commission certain carriers, appellants herein, were shown to be earning at the time rates of return in excess of 5.75 per cent (Answer of the Public Service Commission of Kansas, herein, R. 588). Some of the more important grain-carrying lines are as follows: A. T. & S. F. Ry., 6.88 per cent; Union Pacific Railroad, 8.91 per cent; Great Northern Ry. 6.28 per cent; Missouri Pacific Ry. 5.81 per cent; G. C. & S. F. Ry., 8.11 per cent; P. & S. F. Ry., 16.45 per cent; Ft. W. & D. C. Ry., 17.61 per cent. These earnings are those reported for the year ended December 31, 1926.

The valuation of the properties upon which the calculations are made would no doubt meet with objections from the carriers, but making reasonable allowances, it is fair to say that the record shows that some carriers in some years must have earned in excess of the 5.75 per cent return. As for the matter of value, it should also be observed that the values of these properties are still in course of investigation, and no definite finding is even yet available.

Prior to the enactment of section 15*a* the principle had become well established by decision that a carrier which has devoted its property to public use is entitled to demand no return in excess of a fair return upon the reasonable value of the property devoted to the public convenience. (*Smyth* v. *Ames*, 169, U. S. 466; *Covington & Lexington Turnpike* v. *Sanford*, 164 U. S. 578; *Wilcox* v. *Consolidated Gas Co.*, 212 U. S. 19.)

Some of the appellants, therefore, are in the position of complaining of a rate order involving reductions in rates notwithstanding their apparent earnings in excess of a fair return. Whatever may be the construction of section 15*a*, it is doubtful that an individual carrier could complain of an order reducing its rates on the ground that all carriers in the group or district in which its lines run are not earning upon the average the fair return contemplated by section 15*a*.

Fettering the Commission With a Single and Supreme Fiat.

The thesis of appellant carriers to the effect that the Commission lays itself open to the accusation of acting in disregard of its legal duties where it orders a reduction of rates over an extensive area on a commodity moving in large volume at a time when the carriers as a group or as groups are failing to secure the specified percentage return on the value of their property, would, if given effect by this court, result in a most serious restriction and curtailment of the

Commission in the exercise of its functions as an administrative and quasi-judicial tribunal. Its freedom of action would be shackled by a fixed and single rule of action and the flexibility of its discretion and powers would be solidly frozen. The consideration of bringing about the allotted return to the carriers would be elevated into ascendancy over all other elements, conditions and circumstances. Adverse economic and trade conditions of country-wide and world-wide extent might be operating with irresistible force to depress the value of the commodities transported by the carriers; the percentage relationship of the level of freight rates to the diminishing value of these articles of commerce might be ever so high and ever so constantly ascending; what the traffic would bear in the assessment of freight rates might be ever so diminishing—and yet under the theory advanced by the carriers herein the Commission would be bound in the midst of a changed and ever-changing economic status of the world to maintain the previous level of freight rates on all basic commodities originating in large volume over widespread territories and seeking movement over the lines of the carriers of this country to consumptive markets and trade outlets. In their briefs the carriers attempt to minimize the effects of these plain inferences from the contention advanced by them by saying that in the grain decision under review herein the Commission "disregarded" or "ignored" section 15*a*, which they say is the keynote of the whole scheme of rate regulation embodied in the interstate commerce act as it now reads. They affirm that the Commission did not give due consideration or due weight to the provisions of section 15*a* as they relate to the allotted return. But when the contentions of the carriers are scrutinized in the effort to perceive the grounds upon which they charge the Commission with "disregarding" or "ignoring" section 15*a*, the chief burden of their complaint is that the Commission is shown so to have disregarded and ignored it by the bare fact that

it ordered certain reductions in a large body of the rates on grain and grain products in an extensive territory at a time when the carriers were not realizing and for a long period had not been realizing the allotted net return on the value of their property devoted to transportation use. The revenues of the carriers can come only from the traffic. Rates do not constitute revenues. Without the movement of traffic in adequate volume, rates of whatever level cannot in themselves supply the carriers with the desired revenues and the allotted net return on their property. And yet despite the all-controlling effect of this fundamental condition, the carriers appear before this court and assert that the power of the Interstate Commerce Commission under present conditions and under those which have obtained for a decade is limited to the ordering of reductions in individual rates here and there for particular hauls of minor and limited scope by reason of a provision in a single section of statute which they would make to override all other sections and all other provisions of a statute enacted, amended, supplemented and developed by congress in the light and under the experience of dealing with the transportation problems of this country for a period of over forty years. In the past the Commission has been invested with the discretionary power to advance or reduce rates as all the existing or shifting circumstances and conditions might require. Under present conditions and as they have existed for the last ten years the carriers would by an interpretation of their own of section 15*a* take away from the Commission one of these two major functions. Under existing circumstances as to the net return they would permit it to advance, but not reduce, rates in a substantial manner. Despite the play of the forces of inflation and deflation and of action and reaction in this country and the world, the Commission would be commanded under the thesis of the carriers to look at only one side of the picture and to disregard all the deflationary

and reactionary elements in the situation to the end that the carriers might have a level of freight rates theoretically high enough to yield the desired return provided a sufficient volume of traffic should move.

Giving Section 15a Its Due Proportionate Weight.

In our view the carriers in their interpretation of section 15*a* have failed to keep things in proper proportion and have not taken into due account the various important purposes and objects of the interstate commerce act as disclosed by a survey of the growth and development of this far-reaching statute. In the original enactment of this statute two great objects, among others, were evident. One was the prevention of the assessment and collection of unreasonable rates and the other was the elimination of unjust discrimination and undue preference as between persons, companies, firms, corporations, localities and particular descriptions of traffic. These two great objects persist in full force to-day in the statute as amended and supplemented. We frankly acknowledge the important supplemental effect of the amendment embodied in section 15*a*. But the true conception of section 15*a* is that it supplements but does not supplant the basic provisions relating to reasonableness and unjust discrimination in rates contained in sections 1 and 3. Section 1 forbids unreasonable rates, but sets up no definite standards or criteria for determining same. The Interstate Commerce Commission and the courts have given content to this section over a long period of administration and interpretation of the act. We believe that section 15*a* was intended to have a modifying influence and effect on these standards and criteria of reasonableness. In our view, however, section 15*a* operates not to submerge existing standards of reasonableness under section 1, but only to modify and to a degree to liberalize same for the benefit of the revenues of the car-

riers and to promote and maintain an adequate national system of transportation.

It will therefore be our purpose in this our brief to discuss some of the preëxisting standards of reasonableness under section 1 and to attempt to indicate the principle underlying section 15*a* as it operates to supplement, modify or liberalize the criteria of reasonableness obtaining prior to the enactment of this amendment under section 1 of the act. Such a treatment of the subject will in our view clearly indicate to the court that the interpretation of section 15*a* advanced by the carriers herein would, if adopted by this court, tend to destroy the essential provisions of section 1 relating to the reasonableness of rates; that such interpretation does not represent a well-balanced conclusion, which can only be arrived at by a proper blending of sections 1 and 15*a* with each other, but arises from the effort to construe section 15*a* as if it stood alone as a separate enactment instead of being properly regarded as a modifying and supplementing factor to be taken into the equation with the other fundamental enactments of the statute; and that such interpretation of the carriers of section 15*a* would, if accepted, call upon the Interstate Commerce Commission to overcome natural economic conditions and forces which it is beyond its inherent power to surmount in the effort to assist the carriers in realizing the ideal of the allotted return on their property embraced in the physical system of transportation as it exists to-day throughout the United States.

Section 15a as It Confronts the Inherent Weaknesses in the National Transportation System.

The carriers affirm that section 15*a* transcends all other sections of the interstate commerce act and that in carrying out the provisions of section 15*a* relating to the allotted return the Commission must subordinate all other parts of the act. In their brief in the

district court they say, as we have already noted, that section 15a "is the keynote of the whole scheme of rate regulation embodied in the interstate commerce act as it now reads." This leads us to reflect upon some of the governing facts and conditions and of the real and inescapable financial and economic problems which confront the Commission in the administration of section 15a in order that the soundness of the carriers' contention in this respect may be put to the test. The present railroad system of the United States is the result of long growth and development. The railroads were not built by the government, but represent the ambitious enterprises and financial hopes of many men and groups of men. Some of these railroads or railroad systems have been soundly conceived as transportation enterprises and have been successful. Their lines have been strategically located so as to enjoy a lucrative and constantly growing traffic. The expenditures for original construction, extension and expansion have been warranted by contemporaneous or future possibilities in available volume and profitableness of traffic. These railroads have been built, developed and maintained in harmony with natural and all-powerful economic forces and conditions and their success is ascribable to the inherent soundness and excellence and to the wise and foreseeing management of these transportation enterprises. There are other transportation enterprises resulting from the laying out and construction of railroads which have lacked these natural and inherent elements of success. It is self-evident that under the great diversity of conditions obtaining in the immense expanse of our country some railroad enterprises must be far less successful than others. Great differences in various parts of the country in the density of population and of traffic, in topography and expense of construction and maintenance, in the nature and value of commodities to be transported, in the cost of labor and materials, and in the judgment, wisdom and foresight of

the promoters, builders and developers of our transportation lines and systems, must inevitably result in a network of transportation partly excellent, partly mediocre, and partly inherently weak and lacking in essential capacity and adaptability for financially successful operation.

This court has itself taken cognizance of the inherent weakness of parts of our national transportation system. In *New England Divisions Case*, 261 U. S. 184, it remarks on page 191:

"It was necessary to avoid unduly burdensome rate increases and yet secure revenues adequate to satisfy the needs of the weak lines . . . weak roads were to be helped by recapture from prosperous competitors of surplus revenues. . . . The weak were to be helped by preventing needed revenue from passing to prosperous connections."

The government of the United States has not endowed the railroads. It has not appropriated the money to make a weak railroad strong. There is, of course, the recapture provision of the act, but congress has not in its enactments provided that a lame railroad or railroad system shall receive grants of money from the national treasury to build up those financial resources and reserves which it is inherently impossible for it to derive from the revenues obtainable from an insufficient volume or an inadequate density or an inferior quality of the traffic which in view of its geographical location may under efficient management flow over its rails. Freight rates have no magical power to overcome inherent deficiencies in our weak railroads or railroad systems.

Section 15a Versus Economic Law.

In dealing with the level of the freight rates the Interstate Commerce Commission is subject to the operation of resistless natural forces and conditions. The Commission cannot determine how much acreage of corn, wheat, oats, barley and other grains the farmer may

think it prudent to plant. This acreage devoted to grain is an elastic, variable and ever-shifting element dependent upon world supply and demand, and on the judgment, discretion and even upon the speculative whims and caprices of the farmers of this country. For this reason the Commission has no power to create the volume or determine the extent or the direction of movement of grain and its products or to dictate the amount of revenues derivable therefrom in defiance of uncontrolled and uncontrollable economic forces. The Commission has no power to determine the number of live stock to be bred or fattened or the extent, direction or distance of their transportation to the markets. The Commission is in the same helpless position with respect to the volume and extent of movement of other than agricultural products. It has no power to command the United States Steel Corporation or the Bethlehem Steel Corporation or the Youngstown Sheet and Tube Company to produce and ship a full and normal volume of their products in order that the railroads under the level of rates prescribed by it may receive a net return equivalent to 5¾ per cent annually upon the value of the property devoted to transportation use. The cotton growers in the South and Southwest and the lumber industry in the North, Northwest and South do not receive or obey orders from the Interstate Commerce Commission as to the tonnage which they are each year to produce and transport to the end that the railroads under prescribed rates may have the desirable volume of revenue. Congress has invested the Commission with not an ounce of power to bring articles of commerce into existence and to compel the movement of same at prescribed rates over the lines of the carriers. And yet in the case at bar the carriers condemn the Commission for reducing some of the grain rates (while increasing others) in a period of business depression and at a time of a great falling away from

the normal volume of general traffic on the mere theory that section 15*a* commands the Commission to maintain, in the midst of all obstacles and under all circumstances and conditions, a net return of 5¾ per cent annually on the value of their property. They would bind the Commission hand and foot like Lazarus in his grave clothes and have this court lay down an arbitrary edict that the Commission is forbidden under section 15*a* to reduce the rates on any commodity moving in large volume over an extensive area of this country if at the same time the carriers are not realizing the allotted return. Under the thesis of the carriers the Commission is not to be permitted to consider whether the level of the freight rates may have an effect on the volume of traffic transported. It is required to disregard an experience in rate regulation during which it has repeatedly found that rates may not reasonably be higher than the traffic will bear. The Commission must ignore its numerous holdings that the value of the commodity is a factor in determining the reasonable level of rates to be levied upon it. According to the view expressed herein by appellants, section 15*a* supplants all these old-fashioned standards and criteria and the Commission must devote itself simply and solely to the one idea of compelling the flow of the desirable quantity of revenue to the carriers, and it must accomplish this result with its narrow legal power to prescribe the level of freight rates even in the midst of a wracked world and a stagnant commerce.

We suggest that a true interpretation of section 15*a* can hardly be arrived at without a proper reflection upon these all-powerful forces and conditions to which we have referred. It is our view that it was the intent of Congress that the Commission should give to section 15*a* a reasonable and sensible administration and that it should not be expected to undertake the achievement of the im-

possible. The very first phrase of the paragraph of section 15*a* in question recognizes the supplementary character of the new enactment and its dependence upon the fundamental provisions of the act as they had in substance existed for over forty years, for we read in the beginning sentence that "in the exercise of its power to prescribe just and reasonable rates" the Commission shall undertake the administration of the matters embraced in section 15*a*. We cheerfully admit and indeed affirm that the new enactment had a modifying effect on the standards of reasonableness which had grown up under section 1. For this reason we have touched upon some of those standards in order that the meaning of section 15*a* and the modifying effects thereof may be more clearly understood.

The Commission as a Mathematical Calculator of the Net Return.

We suggest again that no sound interpretation of section 15*a* can be reached until full consideration is given to the all-powerful natural conditions and forces with which the Commission must deal in administering this provision of the statute. The attempt of section 15*a* is to provide a prescribed net percentage return for the carriers on a rather definite value of property devoted to transportation use. In this effort the Commission is compelled, however, to deal with basic and ruling conditions and forces which are inevitably operating and which are at times exceedingly unstable and variable. By direction of law the Commission has for a long period of years been making a valuation of the property of the carriers, and for practical purposes the results are now somewhat complete. While the value of the railway property changes from time to time by reason of depreciation and depletion, additions and betterments, the building of new lines or the extension or abandonment of old ones, and so forth, it may nevertheless be truthfully said that the value of the railway property devoted to transporta-

tion use is now a rather definitely ascertained factor in the situation. The Commission has set 5¾ per cent as the allotted return upon the property. If the task of the Commission in administering section 15*a* consisted simply of computing percentagely the net return in relation to the value of the property, the discharge of the undertaking imposed upon it by the law would be simple and easy. An ordinary mathematician could readily perform all its functions in this respect. But when the Commission is called upon to adjust the freight rates on an immense number of commodities over large territorial expanses in such a way as to bring about a fixed net return on a definite valuation of property, it is in the nature of things compelled to deal with mighty and all-powerful economic forces and conditions requiring the exercise of the highest type of administrative wisdom and discretion. In the midst of such difficulties mathematical computations would be the most futile and useless of things.

The Worth of the Service as a Limitation on Freight Rates.

A fundamental factor in the fixing of rates is the value of the transportation service to the shippers. This has ever been, and must in the nature of things ever continue to be in the future, a basic element. There is a large number of the major commodities which must be successfully moved in extensive volume. There is an almost unlimited number of minor commodities of infinite variety in kind and value. An extensive experience in the past regulation of rates has fully demonstrated that the nature, value and extent of movement of each commodity must be carefully considered in determining the level of the rates to be applied thereto. The value to the shipper of the transportation service with respect to a given commodity is of controlling importance. Sand cannot be sold and shipped upon a level of freight rates properly applicable to coal. Under resistless economic forces and conditions, sand cannot stand

a level of rates under which coal may move with ease and in full volume. The value of the transportation service with respect to sand is not *worth* the level of the rates on coal. In the last analysis, the money payable for transportation must come out of and be supplied by the commodity transported. Coal cannot inherently pay the level of rates properly applicable upon wheat. Coal does not have an unlimited value to the domestic or industrial consumer. It cannot be made permanently to yield freight revenues which are out of due proportion to the value of the commodity. The worth of the transportation service to the shipper is determined to a considerable extent by the value of the commodity transported. This value and the consequent worth of the transportation service vary markedly at different times and in different periods. The resistless forces of economic law bring about these variations in commodity values. The contention of the carriers herein is that the Commission may not revise the freight rates downward on a basic commodity over a large territorial area in the presence of a downward trend over a period of years in the value of that commodity, if a mathematical computation indicates that the carriers as a whole or in groups are not realizing the specified percentage return on a fixed and substantially invariable value of the railway property devoted to transportation uses. During a period of over forty years of regulation the Commission has held the worth of the transportation service to be a fundamental criterion in the prescription of reasonable rates. It has assumed that the level of the freight rates must inevitably be related to the value of the commodity. It has not, of course, made the value of the commodity or the worth of the service the sole tests of reasonableness. Other factors have been considered. But the Commission has gone on the principle that it is not possible, lawful or just to extract from a commodity freight rates which are in excess of the value of the transportation

service performed upon such commodity. In the case at bar the carriers in effect assert that the old standards of reasonableness under section 1 were swept away, that a new paramount criterion governing the level of rates was introduced through the enactment of section 15a, and that to-day the consideration that the carriers secure the allotted return transcends all others and nullifies and destroys all previous tests respecting the justness and reasonableness of rates. Hitherto the determination of the reasonableness of rates has elicited from the Commission an administrative discretion in which numerous factors, forces and conditions were weighed together in reaching a well-balanced conclusion as to the lawful and proper level of freight rates on a single article or on numerous commodities. This in the view of the carriers is now all to be done away with. The alloted return on their property is to be the supreme consideration. The Commission is not to consider whether the level of rates demanded by them on grain and grain products will in actual operation tend to diminish the volume produced and shipped. In an era of declining prices it is to disregard the diminished worth of the transportation service. The rich content of tests, standards and criteria of reasonableness evolved in past decades in administering the interstate commerce act is to be cast out of the mind of the Commission. Its powers to order general rate reductions in the absence of the net return are to be deemed as abridged. Its chief function is to assume the rôle of a mathematical computer of the percentage relationship of the net return to the value of the railway property. Where, as during the last decade, the carriers have not earned the allotted return, its simplified duty with respect to general rate revisions is to consist in generally elevating the levels of freight rates on the principal commodities over wide territories in the simple faith that nothing else is required either to promote justice or to produce

adequate revenues. The grain growers may restrict their acreage of planting or retire in variable degrees from their enterprise of grain production. The competitive grain and grain products of Canada, the Argentine, Russia, France, Australia and China may supplant the grain of the United States in the markets of the world by reason in part of the burden of the freight rates. Of all this the Commission is to take no notice. It is to shut its eyes to the resistless downward trend of commodity values throughout the world and to proceed in the sublime faith that rates and rates alone will bring forth adequate and ample revenues for the carriers. If this be the import of section 15*a* it is time that Congress and the people of the United States understood it and that they be brought to realize that their aspirations for the maintenance of the revenues of the carriers and an adequate transportation system have been embodied in a provision of the interstate commerce act based on the pursuit of economic folly.

No Magic in Section 15a.

Obviously, therefore, the maintenance of an adequate system of transportation in the United States is an enterprise the success of which is dependent on the observance of the controlling laws of economics and trade. A suitable provision in an act of congress, when properly interpreted, will undoubtedly contribute materially to the accomplishment of the result desired. But there is no sorcery in a mere legal fiat which will transform the transportation system of the carriers into a successful business enterprise in violation of the just and reasonable rights of the shippers and in antagonism to the overwhelming force of the laws of economics and trade. In regulating the freight rates the Interstate Commerce Commission is charged with the fitting of its activities into this general enterprise of transportation. Its powers are not miraculous. It cannot simply

smite the rock with high freight rates and cause abundant railroad revenues to gush forth. Nor is the ability of the carriers to realize the allotted return upon the value of their property a foregone conclusion. Though it is a consummation devoutly to be wished, it can be achieved, if at all, only by a course in harmony with the transcendent forces of the economic law and legal justice. Section 15a cannot reasonably be construed to command the Commission to accomplish an arbitrary result which it is impossible to achieve under the trend of the times and in the face of forces and conditions which no law can nullify or divert from their full operation and effect.

We submit, therefore, that it was not the purpose of section 15a to supplant or destroy the great principles and standards of rate regulation which had previously grown up in the interpretation of section 1 and other parts of the interstate commerce act during a long period of regulation. This is not to say that section 15a did not importantly modify and supplement the statute as it previously stood. Its effect, however, is evolutionary rather than revolutionary. It sought to inspire a deeper attention on the part of the Commission to the revenue needs of the carriers. Without eliminating previous standards relating to the reasonableness of rates, it added or gave new emphasis to another factor of reasonableness, namely, the revenue needs of the carriers as related to the maintenance of an adequate system of transportation. To give this new factor a devastating supremacy would be to defeat the very end of section 15a, for obviously a successful system of transportation in the United States cannot as a matter of inherent possibility be based on freight rates which transcend the value of the service to the shipper or which by their excess suppress and diminsh the volume of traffic, or which disregard the effects of other forms of carrier competion, or which run counter to the basic laws of economics and trade. That section

15*a* lays a new affirmative duty on the Commission we do not deny. But in our view the duty of the Commission under section 15*a* with respect to the net return is an obligation, not to elevate that factor into a sweeping supremacy, but to weigh it with other preëxisting standards and criteria developed in a long history of administration of the interstate commerce act by the Commission and the courts.

Business Hazards Surrounding the National System of Transportation.

In the effort properly to interpret section 15*a*, we suggest that it should be fully realized that transportation by common carriers in the United States is still a business enterprise. It is still encompassed with many, if not almost all, of the risks and vicissitudes of a business venture. To be sure, the transportation system is impressed with a public use, which fact distinguishes it sharply from a private undertaking. But the federal government has up to the present time made no enactments which eliminate, in any thorough and effective manner, those basic hazards which attend the operation of business enterprises in general. The provision in section 15*a* designed to secure the desired revenues for the carriers and to promote the maintenance of an adequate system of transportation represents, therefore, in the nature of things, an aspiration and effort to bring about the ends desired, but it does not and cannot nullify the operation of those natural forces and conditions which determine the success or failure of other business ventures. This is not to intimate that the Commission is not charged with solemn affirmative duties in its administration of section 15*a*, nor is it to say that this enactment has no effective power to accomplish the objects desired; but it is to realize that in the simple weapon of the freight rates the Commission has been invested with no adequate strength whereby it is inherently possible for it to overcome many of those

all-powerful forces and vicissitudes which surround and control other lines of business enterprise. We trust the court will permit us to clarify our statement by an illustration which refers to certain current conditions of common knowledge. Let us hypothetically assume the percentage relationship of the present values of various commodities to the peak values of 1929 to be as follows: Goods at wholesale, 70 per cent of the 1929 peak; wheat and corn, 38 per cent; oats, 43 per cent; cotton, 32 per cent; wool, 62 per cent; cattle, 59 per cent; hogs, 44 per cent; lambs, 34 per cent; lumber, 68 per cent; and copper, 32 per cent. We mention these figures not in the effort to inject evidence into this discussion, but simply for illustration; but we are entitled to the presumption that the extensive record before the Commission in the grain case contains ample similar evidence so far as the same may have a bearing on the issues in that proceeding. Is it reasonable to suppose that the transportation enterprise of the common carriers in the United States can escape the effects of world-wide economic and trade conditions such as those noted? Is it reasonable to imagine that the Commission has under such circumstances the inherent power through the simple device of freight rates alone to bring into actual existence a fixed percentage return to the carriers on a definite valuation of their property covering a period of twenty years? Is it fair to the Commission to attribute to it a disregard and violation of its legal functions under section 15*a* in the presence of such insurmountable forces and conditions as our illustration portrays? The carriers, as we have said, insist that the provision in section 15*a* relating to the fair return is the keystone in the arch of rate regulation as the interstate commerce act is now constituted. It is in their view to be deemed as outstripping all other considerations. How can this be reasonably asserted in the light of our illustration? Section 1 of the act has hitherto embraced the value of the commodity

and the worth of the transportation service as basic criteria of reasonableness. May it be fairly urged against the Commission that it "failed to consider section 15*a*" when it reduced the rates on grain and grain products under a record of 2,100 exhibits and 55,000 pages of transcript which this court will presume revealed in all fullness the pertinent circumstances, facts, conditions and forces of the kind and character which are visualized in our illustration?

The Words "As Nearly as May Be" and Their Deeper Significance.

The provision of section 15*a* under discussion directs the Commission to prescribe rates which will enable the carriers to earn a net railway operating income equal, "as nearly as may be," to a fair return. On page 105 of their brief in this court the carriers indicate their belief that the words "as nearly as may be" simply recognize that the rate of return contemplated could not be achieved "with mathematical accuracy." We suggest that these words have a much deeper significance. They recognize the existence and inevitable operation in connection with the transportation enterprise of those all-controlling and inescapable economic forces, conditions and hazards which we have sought to portray. We think that the considerations mentioned have an important bearing on the true interpretation of the provision in section 15*a* relating to the fair return. We suggest that congress intended no more than to add an additional factor or standard of reasonableness to those already obtaining under section 1. The weight and effectiveness of this new factor must inherently depend to a degree on other basic and resistless circumstances, conditions and forces. This new factor cannot reasonably be held to have supplanted or subordinated the criteria of the value of the commodity, the worth of the service, the risks

in transit undergone by the carriers, the natural limitation of what the traffic will bear and other standards under section 1 of the act, for these standards represent no artificial or arbitrary theories of rate-making but simply give heed to the primary demand of justice and reflect the all-powerful forces and conditions of trade and commerce which we have noted. Section 15*a* relative to a fair return embodies, therefore, not an artificial legal fiat or an arbitrary command to the Commission to perform the impossible. It is not a repeal of the Commission's discretion in its administrative task of prescribing the rates. Nor is it a colorless and meaningless enactment. The conscience of the Commission is charged with the duty of seriously including this new factor and giving it all the weight which can reasonably be assigned to it under the facts and circumstances presented. It cannot be doubted that this new factor has in the past resulted and in the future will result in the actual lifting of the general level of freight rates. It is as if in the presence of existing forces, a new and modifying force is introduced, producing a changed and different resultant in level and direction. The old forces are not withdrawn or disregarded. Their effect is merely modified by the operation of a new pressure.

On page 74 of their brief in the supreme court, appellants say:

"In the district court, counsel for the Commission, however, as well as counsel for all other appellees, took the position that it was not the duty of the Commission to give any consideration to section 15*a* in this case."

On the same page of the same brief the carriers say:

"The argument below was that the commission is not required to give any consideration to the requirements of section 15*a* in any case, of whatever scope, and however direct a bearing the action taken may have upon the rate of return of *all* of the carriers in one or more of the rate-making groups established by the Commission under section 15*a*, save only in a proceeding in which all of the rates of such carriers are under review at one time."

This appellee has taken no such position either here or in the district court. We have consistently said, and here reaffirm, that it is the duty of the Commission in all rate cases, large or small, to give all due consideration to the net-return provision of section 15*a* as one of the important factors of reasonableness. We say simply that it is not the only factor. We affirm further that the record before this court clearly indicates that the Commission did accord all due proportionate weight to the net-return provision in its decision relative to the rates on grain and grain products.

The "Zone of Reasonableness" and the Issues Herein.

We quote again the statement on page 40 of the brief of the carriers in the district court as follows:

"If, despite the requirements of section 15*a* and at a time when the carriers are receiving far less than the rate of return contemplated thereby, the Commission may reduce by from 10 to 13 per cent all of the rates on grain and grain products from which 12.1 per cent of the aggregate revenues are derived, it may by the same token make similar reductions in the rates on all other major descriptions of traffic and thus not only prevent the carriers from ever receiving the fair rate of return contemplated by the statute but materially reduce revenues already altogether inadequate thereunder."

The foregoing is a flat and unqualified statement that the Commission may not lawfully reduce a substantial body of rates on a heavy-moving commodity in the absence of the assigned net return of the carriers. The appellants apparently became fearful upon further reflection, as to the entire soundness and validity of their contention, for later they appear to qualify the proposition announced. On page 86 of their main brief in the district court the carriers say:

"Assuming that the Commission is empowered by the interstate commerce act to reduce rates already within the zone of reasonableness to a lower point in such zone, it is not empowered so to do

when the carrier's rate of return is less than that required by section 15*a*, and in doing so the Commission both exceeded its powers under section 1 and disregarded the positive duty imposed upon it by section 15*a*."

On page 88 of the same brief the carriers add:

"It appears on the face of the report that the carriers' rate of return was far below that contemplated by section 15*a*. Whatever, therefore, may be power of the Commission when the carriers' revenues exceed those contemplated by section 15*a*, to move rates about within the zone from the highest possible to the lowest possible rate, it clearly may not exercise such power consistent with the duty imposed by section 15*a* when the carriers' revenues are far below the standard created thereby. Assuming the existence of the power asserted, section 15*a* constitutes a clear limitation upon the exercise of such power under the circumstances described."

Language to the same effect will be found on pages 30, 31 and elsewhere throughout the brief of appellants in the supreme court.

As shown by the quotations above, the carriers affirm that when they are not realizing the allotted return the Commission may not reduce rates on a major commodity over extensive territory if those rates are already within the "zone of reasonableness." The "zone of reasonableness" is a phrase much used in the rate field during recent years. What underlies this expression? We hear much of the upper limit and the lower limit of this zone of reasonableness. Some rates are said to fall just under the top, others just over the bottom, and still others would appear to be stationed more or less vaguely somewhere in other strata of this zone. The Commission is pictured to us as trudging about and anchoring rates or bodies of rates at various heights and depths between the roof and the floor of the "zone of reasonableness." When the Commission has established a rate or set of rates under all the facts, circumstances and conditions revealed by the evidence in a case before it, we are told in effect that the result arrived at is not to be considered as representing anything definite in the way of a just and

reasonable level, but it is merely presumed to fall somewhere (nobody can say where) between the upper and nether extremities of the "zone of reasonableness."

We do not deny that there is an elasticity and flexibility in the exercise of the functions of rate regulation. Both this court and the Commission have recognized and stressed them. There can be no objection to the phrase, "the zone of reasonableness," provided its content and meaning be properly understood. This court has occasionally employed it in its proper sense. (*American Express Co. v. South Dakota*, 244 U. S. 624.) But it is a striking and an arresting phrase and one well calculated to pass into current use and to become perverted from its appropriate significance in the process. In performing its administrative duties the Commission is undoubtedly permitted the freedom of a "zone of reasonableness" in the exercise of its administrative discretion. An infinite mind assigned to the task of regulating rates might need no such latitude of discretion. It could fully perceive and grasp the complex and almost endless facts, circumstances and conditions involved in an intricate rate case and arrive at a correct result with such accuracy and precision as to attain the perfections of an ideal justice. Not so, of course, with the human members of the Interstate Commerce Commission. To them must be granted a latitude of discretion in dealing with matters of such scope, diversity and complexity as are involved in a proceeding such as this, embracing the rates and practices relative to grain and grain products. But the zone of reasonableness attaches to the exercise of the Commission's discretion and not to the result arrived at. When that discretion has once operated in harmony with the guiding hand of the law, as interpreted by this court, it must be presumed that the prescribed rates are the precise and definite fruits of administrative justice. They stand, until changed, as the only and exact just and reasonable rates. If is so

everywhere in the law. A jury has a discretion in finding the facts and formulating its verdict. But when it has validly acted under legal instructions received by the court the decision reached is not deemed simply to fall somewhere within the "zone" of justice. In contemplation of law it represents precise, definite and inflexible justice. A federal judge may be given a latitude of discretion in fixing the term of imprisonment of a felon, but when the court has acted and set the time of service for the prisoner the result is not in law to be regarded simply as being somewhere in the "zone" of justice. A chancellor in disposing of an intricate and involved matter in equity is given a wide zone of discretion in passing upon the veracity and reliability of the testimony of witnesses, in determining the primary and ultimate facts involved, and in dealing with the multiplicities which often characterize proceedings in that branch of the law. But when the discretion of the chancellor in all its latitude and flexibility has once been exercised the forthcoming decree is not in law assumed to be merely something falling somewhere within the "zone" of equitable relief. It is to be regarded as an embodiment of precise and definite justice as administered by that department of our jurisprudence. We suggest that the rates prescribed by an administrative tribunal are not to be differently regarded. In reaching its conclusions the Commission has a wide administrative discretion in the zone of reasonableness, but there can be no good logic in looking upon such a zone of reasonableness as existing with respect to and enveloping the resulting rates themselves. Section 1 of the interstate commerce act requires the maintenance of just and reasonable rates and not rates within a *zone* of justness and reasonableness.

We believe, therefore, that the "zone" idea as advanced by the carriers will not be helpful to the court in disposing of this case. In the main brief of the carriers in the district court this idea was

touched upon but lightly, but in their reply brief and in their brief here it is given much prominence. If the nature of the zone theory has, as we have sought herein to show, been misconceived by the carriers, obviously the arguments of the carriers based thereupon need be given no serious attention by this court. The carriers assert that where the rates lie within the zone of reasonableness the Commission may not, in the absence of the allotted return, reduce them so as to lower their level within the zone. But the argument is simply unintelligible if their notions of the zone theory are, as we think, untenable. If the zone of reasonableness is in the exercise of the Commission's discretion and not in the resulting rates the carriers are merely saying that where rates are reasonable the Commission may not reduce them if the carriers are at the same time failing to receive the allotted return. This is to say nothing significant at all, for if rates are reasonable the Commission could not legally, and presumably would not, reduce them in any event, whether the carriers are earning the return or not.

The "zone" argument of the carriers is without point, for in investigating the rates on grain and grain products the function of the Commission was to prescribe just and reasonable rates under the composite standards and criteria of both sections 1 and 15*a*. It was not concerned with, nor did it indulge in, the elusive pastime of moving rates up and down within the "zone of reasonableness." It was charged with employing and did employ its flexible administrative discretion in determining a single and definite level of reasonableness and in finding rates above such level to be unjust, unreasonable and unlawful. There is no point to the "zone" argument of the carriers for the further reason that the Commission did in fact find the grain rates, dwelt upon by the carriers, to be excessive, unjust and unreasonable and prescribed proper, just and reasonable rates. True, the carriers insist that the Commission abused this

discretion and exercised it while under the cloud of legal error, but this affirmation is in no way supported, and no enlightenment is given to the court as to any sound basis for making it, by the lengthy discussion and exposition by the carriers in their briefs of a false conception and a wrong application of the concept of the "zone of reasonableness." Their entire contention in this respect remains based simply on the assumption that the Commission condemned and reduced rates which were at the time lawful, just and reasonable.

Section 15a Not Construed by the Commission as a "Mere Permission."

The carriers seize upon the language used in the report in connection with section 15*a* as alleged evidence of a misconstruction by the Commission of that section. The statement referred to is as follows:

"The question here presented is . . . also whether the general level of rates on all traffic as a whole is sufficiently high to accord to the carriers the rate of return contemplated by law, including section 15*a* of the interstate commerce act, which we construe to permit, but not to guarantee, the carriers to earn 5.75 per cent on the fair value of the property devoted to the transportation service." (p. 627 of the Commission's report, R. 77.)

A fair view of the language used by the Commission is that the intention was to say that the effect of section 15*a* was not to require the Commission in all events and without regard to other things to maintain the rates of the carriers upon such a plane as would produce the 5.75 per cent return, but that the fair return is only one of the many factors which enter into the question of the reasonableness of rates and which the Commission is bound to weigh and consider.

The Commission does not say that it need not consider the provisions of section 15*a* and give full force and effect to them. On the contrary, the language is:

"The answer *must take into account* . . . section 15*a* of the interstate commerce act, which we construe . . ."

Obviously, the intention is to say that section 15*a* must be taken into account and weighed as one important factor, but that it is not to be given preëminence to the exclusion of other basic factors, certainly not to the extent of requiring the maintenance of unreasonable and otherwise unlawful rates for the purpose of producing the average 5.75 per cent return. This reasonable interpretation of the Commission's language comports with the view of section 15*a* which has been taken and continuously maintained by the Commission since the enactment of the section in 1920.

The interpretation placed upon section 15*a* by the Commission, properly understood, is not to nullify the section. On the other hand, the Commission has shown continuing evidence since the enactment of the section of a due regard for its provisions and a full sense of its responsibility thereunder. The carriers here are merely endeavoring to take advantage of a form of words and infer a meaning which the language does not justify and is positively negatived by many other expressions and actions of the Commission, later discussed in this brief.

The Commission's Alleged Indefinite Standard.

It is contended by the carriers that the Commission substituted for the positive standard of section 15*a* an indefinite standard of its own. Stress is laid upon the sentence appearing on page 698 of the Commission's report, as follows:

"We are satisfied that the readjustment will not threaten the maintenance of an adequate system of transportation,"

and it is contended that the expression "the maintenance of an adequate system of transportation" is lifted bodily from the Hoch-Smith resolution and that similar language appears in the Commission's report in *California Growers' & Shippers' Protective*

League v. S. P. Company, 129 I. C. C. 55, the order in which was set aside in *Ann Arbor R. Co. v. United States*, 281 U. S. 658. From all of which the carriers infer that the Commission was proceeding under the erroneous construction of the Hoch-Smith resolution entertained by it prior to the decision in the Ann Arbor case instead of under the interstate commerce act.

The contentions of the carriers regarding the Hoch-Smith resolution are encountered elsewhere in their brief. They are apparently introduced to persuade the court that the Commission has ignored section 15*a* and has done so upon the theory that the Hoch-Smith resolution had modified the provisions of section 15*a*. To make their point they rely again upon the use by the Commission of certain language: "the maintenance of an adequate system of transportation," as found on page 698 of the Commission's report. But the use of this expression by no means indicates that the Commission was giving an erroneous construction to section 15*a*. On the contrary it could be taken as evidence that the Commission was influenced by section 15*a* rather than by the resolution, for we find the expression in the section itself and in decisions antedating the resolution.

In the third paragraph of section 15*a* the following sentence occurs:

"In making such determination it shall give due consideration, among other things, to the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation."

Thus it appears that in the transportation act, 1920, congress used the expression "adequate transportation." In *New England Divisions*, 66 I. C. C. 196, decided January 30, 1922, the Commission said at page 199:

"Yet all are parts of the national transportation system and must be adequately maintained . . ."

And in *Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, we find:

"The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and take other important steps to *maintain an adequate railway service* . . ." (Italics supplied.)

And the words "maintaining an adequate national railway system" are also found (p. 585).

Subsequently, in the Hoch-Smith resolution, approved January 30, 1925, congress used the expression referred to by the carriers, "the maintenance of an adequate system of transportation," and it was evidently but a restatement of the same thought in slightly different language. The idea in all these several similar expressions is the same, and the fact that the Commission in these proceedings hit upon the precise form of words used in the Hoch-Smith resolution cannot be taken to mean that it was being guided by that resolution, the idea itself obviously antedating the resolution.

Duty of the Commission to Consider Section 15a.

It is contended by the carriers that it is the duty of the Commission to consider section 15*a* in a case like this, which pertains to the rates on a single description of traffic only. It will scarcely be contended otherwise since the plain words of the statute are that—

"In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole . . . will, under honest, efficient and economical management . . ., earn an aggregate annual net railway operating income . . ."

The question is, as we see it, not whether the Commission is bound to consider section 15*a*, but rather what weight should be given to the section.

The effect of the carriers' argument is that it must be given such predominant effect that, if the earnings of the carriers on the average are substantially less than the 5.75 per cent return, and the Commission prescribes reasonable rates on a substantial body of traffic which result in reductions of the carriers' revenue, the hands of the Commission are completely tied, and it may not require such reductions to be made. We say, on the other hand, that the provisions of this section must be considered by the Commission in every instance where it undertakes to exercise its power to prescribe just and reasonable rates and, therefore, in this case, as in others; but that this is but one of the many factors which enter into the question of the reasonableness of rates, and the weight to be given it, as with the other factors, is for the Commission to determine, and its determination is conclusive.

The report of the Commission states that in determining the prescribed rates it took into account with other factors the provisions of section 15*a* (p. 627, R. 77), and that "the action here taken represents the fullest possible response to all the mandates of the law affecting, among other things, the important subjects of levels . . . and the maintenance of an adequate system of transportation" (p. 697, R. 147); the latter plainly referring to section 15*a*. The carriers contend that, regardless of these affirmations, the Commission in fact ignored and disregarded section 15*a* because of an erroneous construction of the law. The evidence relied upon to prove that the Commission acted upon such erroneous interpretation is exceedingly flimsy, as has just been pointed out, and falls short of denying the positive statements of the Commission. It must be taken, therefore, that the Commission did consider and give sufficient weight to the section.

The Commission's Conceptions of Section 15a as Indicated by Its Decision on the Recent General Rate Increase Application.

It would appear that the carriers themselves have of late begun to realize the futility of attempting to run counter to economic forces and commercial conditions in applying section 15*a*, for in the Commission's very recent decision (October 16, 1931) in the *Fifteen Per Cent Case, 1931, Ex Parte*, No. 103, 178 I. C. C. 539, we find it making, on page 557, the following observation:

"The carriers are not seeking the full fair return on value to which they assert that they are entitled by law. They are willing to share with other industries the burden of the general depression. They ask to be relieved of a part of their present burden on the grounds that public regulation prohibits them from sharing to the same extent as private industries in the profits of prosperity, that their present low earnings imperil their credit and hence the stability of an industry on which all others are dependent, and that the increase desired will restore confidence, stimulate buying, and lead the way to a return of prosperity. They further assert that on any conceivable basis of valuation they are falling so far short in their earnings as to make it unnecessary to determine in this proceeding the actual aggregate value of their properties devoted to carrier use. For similar reasons they deem it unnecessary to inquire whether the 5.75 per cent, heretofore fixed by us, is a fair return under present conditions."

In the same decision the Commission with some fullness sets forth its interpretation of section 15*a* and its own conception of its legal duties and powers thereunder. In so doing it reviews and seeks to convey its understanding of decisions of this court relating to the same subject. We quote from pages 560 to 566 of the opinion in the *Fifteen Per Cent Case, 1931*, supra:

"Before indicating the nature of the opposition, it will be well to consider the contentions of the carriers with respect to the law. Technically, the application is under section 6 of the interstate commerce act for authority to depart from our ordinary rules governing tariff publication, coupled with a request that we now reach the con-

clusion, after investigation, that if the contemplated tariffs are filed they will not be suspended. Fundamentally, however, the carriers rely upon the provisions of section 15*a* (2), reading as follows:

"'(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or reasonable, and to prescribe different rates for different sections of the country.'

"Section 1 (5), which antedates section 15*a* but was reënacted in the 1920 legislation, requires, among other things, all charges made for any service rendered in the transportation of property to be just and reasonable, and it prohibits and declares unlawful 'every unjust and unreasonable charge for such service or any part thereof.'

"Briefly stated, it is the position of the carriers that section 15*a* changes our duty to prescribe just and reasonable rates by introducing in the law a new standard for our guidance. It is asserted that under the former law a carrier in a competitive group had no legal protection unless the strongest carrier in the group was in a position successfully to assert confiscation of its property. The rates being competitive, the weaker line had to meet them or go out of business. The stronger line might not be disposed to assert in the courts its constitutional rights. Even if it were so disposed and succeeded in the assertion, the increase it could secure in the rates would only be that which would bring its own earnings above the line of confiscation of its own property. Such a measure of relief would fall below, perhaps much below, the measure of the constitutional rights of the weaker lines. Prior to 1920, the argument is that we had dealt with revenue considerations as a factor in just and reasonable rates, but had not solved the problem of the treatment of groups of railroads in such a way as to maintain their earnings, their credit and their adequacy as component parts of a national system of transportation. Section 15*a* was designed to remedy that failure. 'In substance,' according to the carriers, 'the constitutional right of a single carrier to a fair return which could

not as a practical matter be asserted, was extended to the group as a whole and the Commission was given a mandate to render the right productive.'

"Because of the provisions of section 15*a*, it is contended that rates, otherwise reasonable, perforce become unreasonably low if the general schedule of rates, of which they are a part, produces revenues which in the aggregate fail to attain the results contemplated by the section. Quoting from the carriers' brief, 'It is thus apparent that in any case involving the reasonableness of an increase or decrease in the general rate level, the revenue consideration is paramount and controlling.' Quoting again, it is said 'that the use of the expression "just and reasonable rates" in section 15*a* connotes a different meaning from its use elsewhere and recognizes the paramount financial consideration.' It is urged that the section is superimposed upon the power to prescribe just and reasonable rates in such a way that if the effect of the exercise of that power is to bring the revenues above or below the statutory level, adjustments of earnings to that level must be made by us through other changes in rates. The words 'as nearly as may be' in paragraph (2), according to this view, introduce no discretionary factor, but merely cover the mathematical impossibility of attaining the prescribed standard precisely.

"In support of this view the carriers rely chiefly upon *Dayton-Goose Creek Ry. v. U. S.*, 263 U. S. 456. Among the statements in that opinion which are stressed are the following:

"'The new act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission, which is . . . by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged. (p. 478.)

"'Rates which as a body enable all the railroads necessary to do the business of a rate territory or section, to enjoy not more than a fair net operating income on the aggregate value of their properties therein economically and efficiently operated, are reasonable from the standpoint of the individual shipper in that section. (p. 480.)

"'It is clearly unsound to say that the net operating profit accruing from a whole rate structure is not relevant evidence in de-

termining whether the sum of the rates is fair. The investment is made on the faith of a profit, the profit accrues from the balance left after deducting expenses from the product of the rates, and the assumption is that the operation is economical and the expenditures are reasonably necessary. If the profit is fair, the sum of the rates is so. If the profit is excessive, the sum of the rates is so. One obvious way to make the sum of the rates reasonable so far as the carrier is concerned is to reduce its profit to what is fair.' (p. 483.)

"Among pertinent quotations from other decisions of the supreme court is the following from *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, 257 U. S. 563, 585:

"'It is manifest from this very condensed recital that the act made a new departure. Theretofore the control which congress through the Interstate Commerce Commission exercised was primarily for the purpose of preventing injustice by unreasonable or discriminatory rates against persons and localities, and the only provisions of the law that inured to the benefit of the carriers were the requirement that the rates should be reasonable in the sense of furnishing an adequate compensation for the particular service rendered and the abolition of rebates. The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain an adequate railway service for the people of the United States. This is expressly declared in section 15*a* to be one of the purposes of the bill.'

"The carriers also stress a report of the house committee when the transportation act, 1920, came out from the conference committee. In this report it was stated that the house bill 'continued the existing law authorizing the Interstate Commerce Commission to prescribe just and reasonable rates,' but that the senate amendment 'added to the just and reasonable rate a requirement that the rates must be adequate to enable the carriers as a whole to earn a fair return on the aggregate value of their property.' It was further stated that the 'house receded from its disagreement to these provisions.'

"Up to a certain point we do not differ with the carriers' interpretation of the law. We agree that our duty with respect to fixing just and reasonable rates was changed by congress in the act of 1920, through the provision of a modified standard for our guidance. We agree that there was then introduced into the law a new element of protection for the carriers in the public interest, a protection particularly of the credit essential to the preservation of an adequate national system of transportation. We believe that it is our duty under the congressional mandate to exercise our powers

in every reasonable and practicable way to the promotion of that end. We agree, as we did in 1920, that in such a general rate proceeding as this, involving primarily revenue considerations, we cannot undertake to consider the justness and reasonableness of individual rates.

"But there is more than this to be said, if our full duty is to be made clear. In *Reduced Rates 1922*, 68 I. C. C. 676, 730, we said, in considering section 15*a*, 'Our function under the law is not that of mere computers and cannot thus be atrophied.' Assuming that the paramount purpose of that section is the provision of adequate revenue for the carriers, it is the *actual revenue result* of a proposed increase in rates which we must have in mind, and not the effect apparent superficially. We understand that in principle the carriers do not dispute this proposition, although they may differ as to how conslusions upon this point are to be reached. Our own is that we are not justified in approving a rate increase if we are convinced that such increase will not operate to the revenue advantage of the carriers.

"On this point, the following from *Florida v. United States*, 282 U. S. 194, 214-215, is pertinent:

"'In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carriers' revenue, the question is that of the relation of the rates to income. The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage. . . .

"'The Commission made no findings as to the revenue which had been derived by the carrier from the traffic in question, or which could reasonably be expected under the increased rates, or that the alteration of the intrastate rates would produce, or was likely to produce, additional income necessary to prevent an undue burden upon the carriers' interstate revenue and to maintain an adequate transportation service.'

"Nor is this all. In *Smyth v. Ames*, 169 U. S. 466, 547, the court said:

"'What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience. On the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth.'

"This principle has repeatedly been affirmed by the supreme court. It is stated in Corpus Juris, vol. 10, page 418, and we think accurately:

" 'The public is entitled to demand that no more shall be exacted from it than the services rendered are reasonably worth, and this right takes precedence even over the right of the carrier to a fair return on its investment when the two rights cannot stand together. In consequence, the value of the service to the public is an important factor in determining the reasonableness of the rates charged therefor.'

"An application of the principle is found in *Covington, &c., Turnpike Co. v. Sandford*, 164 U. S. 578, 597, where the court said:

" 'It is alleged here that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just for the public. If the establishment of new lines of transportation should cause a diminution of the number of those who need to use a turnpike road, and, consequently, a diminution in the tolls collected, that is not, in itself, a sufficient reason why the corporation, operating the road, should be allowed to maintain rates that would be unjust to those who must or do use the property.'

"We do not understand that congress, even if it be assumed that it could lawfully have done so, attempted in section 15*a* to override or discard this basic principle of the law, or that there is anything in the decisions of the supreme court which indicates that such a result has been accomplished. In *Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co.*, supra, 586, the court said:

" 'Section 15*a* confers no power on the Commission to deal with the intrastate rates. What is done under that section is to be done by the Commission "in the exercise of its powers to prescribe just and reasonable rates," *i. e.*, powers derived from previous amendments to the interstate commerce act, . . .'

"In the *Dayton-Goose Creek Case*, the question at issue was the validity of the recapture clause, and the court was not called upon to define or consider all the factors which affect the determination of reasonable rates. It did say that an individual shipper, because of his interest in the maintenance of 'all the railroads necessary to do the business of a rate territory,' could not complain of a general level of rates higher than would have been reasonable considering the services rendered him alone. We agree with the carriers that prior to section 15*a* the revenue needs which we were bound to consider were those of individual carriers, although as a practical matter we have long considered all competing lines and not merely that

line which can handle the business cheapest in determining the reasonableness of rates. *Receivers and Shippers Asso. v. C., N. O. & T. P. Ry. Co.*, 18 I. C. C. 440. Thereafter the standard was changed by congress so that now we are bound to consider instead the revenue needs of the carriers in the aggregate or by groups, and such needs were brought into the foreground and emphasized. In every reasonable and practicable way we must recognize those needs and protect the general credit of the carriers. The direction to maintain an adequate system of transportation was reaffirmed by congress in the Hoch-Smith resolution in 1925, U. S. Code, T. 49, sec. 55.

"But section 15*a* has not, in our opinion, made revenue needs the 'paramount and controlling' factor in the determination of a reasonable general level of rates. Factors which theretofore were relevant and entitled to consideration, notwithstanding the revenue needs of individual carriers, are still relevant and entitled to consideration, notwithstanding the revenue needs of the carriers in the aggregate or by groups. Among those other factors are the following:

"1. *The value of the service to the shipper.* The relation of the general level of freight rates to the general level of commodity prices is a factor which cannot be disregarded, particularly in a time of general financial prostration. Stated in another way, it means consideration of what the traffic can reasonably be made to bear. As the supreme court recently said in *Ann Arbor R. Co. v. United States*, 281 U. S. 658, 669, in speaking of certain words in the Hoch-Smith resolution:

"'If they mean no more than that the depressed condition of the industry is to be given such consideration as may be reasonable considering the nature and cost of the transportation service and the need for maintaining an adequate transportation service, they work no change in the existing law.'

"This resolution became law subsequent to the enactment of section 15*a*.

"2. *The volume of business carried on by the carriers and its relation to what may be deemed normal.* As we said in *Reduced Rates, 1922*, supra, 680:

"'The operation of economic forces which have prevented, or which may hereafter prevent, carriers from earning a fair return under the adjustment prevailing does not constitute a bar to determination of what a fair return should be. By the qualifying words, "as nearly as may be," congress recognized that conditions

during certain periods might prevent such realization under any adjustment of rates.

" 'Section 15*a*, reasonably construed, contemplates the determination of a return which the carriers, collectively or in rate groups, may attain over a period of time under rates adjusted from time to time with that object in view. The phrase "from time to time" does not mean that we should adjust and readjust rates to meet business fluctuations.'

"It is only necessary to have in mind the incongruous results which would follow an attempt to adjust rates so that a stable rate of return would be realized, notwithstanding general business conditions and the rise and fall of traffic in consonance therewith, to realize the unreasonableness and impracticability of any such policy. In part this is recognized by the carriers in this very application.

"3. *The return realized from the freight service alone, as distinguished from other forms of service rendered by the carriers. Nor. Pac. Ry. v. North Dakota*, 236 U. S. 585, and *Norf. & West. Ry. v. West Virginia*, 236 U. S. 605. It is not our view that these cases prevent the imposition of a burden upon one form of service to compensate for an inevitable deficiency in earnings of another form of service performed by the same carrier. *Revenues in Western District*, 113 I. C. C. 3, 22-23. However, the earnings of the particular service in question are entitled to consideration in the fixing of reasonable rates.

"For the moment we express no opinion as to the weight to be given these particular factors in the present proceeding. That will be considered later. But that they are relevant and material factors which must be given consideration we are persuaded. We are here speaking of the general level of rates, as applied to all traffic, or particular forms of traffic, and not of individual rates."

We submit that the foregoing views of the Commission as to the meaning and effect of section 15*a* are as a matter of law sound in every substantial respect. There is nothing in its main opinion or the separate opinions of commissioners in the grain and grain products case, or in the facts and circumstances surrounding that decision to afford any reasonable basis for believing that the Commission employed any different principles or entertained any different conceptions as to its legal powers and duties in arriving at its conclusions, from those revealed in its opinion in the *Fifteen Per Cent Case, 1931*, supra.

The Alleged Proof that the Commission Misapplied the Hoch-Smith Resolution.

As we have already noted, appellants contend that the Commission misconstrued and misapplied the Hoch-Smith resolution, which reads as follows:

"That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

"That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years, to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

"In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of

agriculture affected by that depression, including live stock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: *Provided*, That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution." (U. S. Code, title 49, sec. 55; 43 Stat. L. 801.)

It will be noted in the third paragraph of the resolution that it directs the Commission with respect to agricultural products to promote the freedom of movement of same "at the lowest possible lawful rates" compatible with the maintenance of adequate transportation service. In *Ann Arbor Railroad Company v. United States*, 281 U. S. 658, decided June 2, 1930, and about thirty days prior to the issuance by the Commission of its decision on grain and grain products in question, the supreme court of the United States held that the Hoch-Smith resolution as a whole and particularly the words "the lowest possible lawful rates" effected no substantial change in the standards and tests of reasonableness theretofore obtaining under sections 1 and 15*a*. Obviously the court could reach no other conclusion. If the resolution had said "the lowest possible rates," it would, we presume, have been unconstitutional, inasmuch as the Commission would then have been directed to set the rates at any level which it might fancy would promote the freedom of movement of agricultural products. The word "lawful," in the phrase "the lowest possible lawful rates," constituted a fundamental barrier to any such action by the Commission. Sections 1 and 15*a* were preëxisting and still remained. They constituted a large part, if not the main part, of the law to which the limiting word "lawful" clearly referred. The essential provision of section 1 had been in existence for about thirty-eight years at the time of the passage of the Hoch-Smith resolution. It had been extensively interpreted by the Commission and the courts, and stand-

ards and criteria of reasonableness thereunder had been fully developed and applied by the Commission and passed upon by this court. This body and content of law was expressly recognized by the use of the word "lawful" in the phrase "the lowest possible lawful rates." Prior to its decision in the grain case at bar the Commission was fully instructed and advised by this court that the Hoch-Smith resolution made no substantial changes in the pre-existing standards of reasonableness under sections 1 and 15*a*. As we more fully show elsewhere in this brief, the Commission stated in its unanimous opinion that it decided the issues in its investigation of the rates on grain and grain products solely under the provisions of the interstate commerce act, and not under the Hoch-Smith resolution. In this main opinion the Commission makes no reference to the "lowest possible lawful rates." Despite all this, the appellants have conceived and emphasized a mist of surrounding circumstances from which they endeavor to place the Commission under suspicion by this court that it ignored section 1 and especially section 15*a*, and that in the secret processes of a mind alleged to have been magnetized, permeated and obsessed by a false interpretation of the Hoch-Smith resolution, it gave that resolution and that false interpretation a preëminent sway in prescribing the reductions in the grain rates complained of.

The carriers stress the fact that the grain rates involved in the present proceeding had been previously considered by the Commission in *Kansas Public Utilities Commission v. A. T. & S. F. Railway Company*, 83 I. C. C. 105 (R. 327), and in *Rates and Charges on Grain and Grain Products*, 91 I. C. C. 105 (R. 341), and contend (1) that as the Commission in those cases found the same body of rates not unreasonable, it must have reached its determination in this case under the Hoch-Smith resolution, and (2) that a supposed analogy between the instant case and the deciduous fruit

cases again leads to the same inference. It is pointed out that the Hoch-Smith resolution was approved on January 30, 1925, a date intervening between the decisions of the Commission in the cases referred to and the decision by the Commission in this proceeding, July 1, 1930, and that the resolution was construed by the supreme court in *Ann Arbor Railway Company v. United States*, 281 U. S. 658, decided June 2, 1930.

It is hardly necessary to remind the court that rate orders of a regulating commission are not *res adjudicata*. Even if the issues were the same and the records similar, a different conclusion may be reached upon any subsequent reconsideration. But in this instance there is but little likeness between the earlier grain rate cases and the one here challenged.

The issue presented in the prior cases was the reasonableness of the rate level on grain and grain products in the Western District *as a unit;* that is to say, whether or not the facts called for a change of all the rates by increases or reductions horizontally. The instant case was far more comprehensive in the number and variety of issues and in the size and adequacy of the record. Here were involved not only the reasonableness of the rate level as a whole, but innumerable and important questions dealing with the reasonableness of levels in the various subdivisions of the Western District and involving the relations of rates under sections 1 and 3 of the interstate commerce act, as between different sections of the country, as between markets, as between ports, as between producing territories, as between milling districts, and as between carriers.

The immense record before the Commission in the instant proceeding is sufficient to negative any inference that its action as to the reasonable level of the rates would have been the same as in the prior cases but for the Hoch-Smith resolution.

Nor will an examination and comparison of the cases bear out

the supposed analogy between the grain rate cases and the decidious fruit rate cases.

The history of the deciduous fruit cases is as follows: In *California Growers' & Shippers' Protective League v. Southern Pacific Company*, 100 I. C. C. 79, the complainant alleged violation of sections 1 and 3 of the interstate commerce act. The decision of division 1 of the Commission on June 25, 1925, was that "The rates assailed, as a whole, are not unreasonable or unduly prejudicial as alleged," and the complaint was dismissed. The Hoch-Smith resolution had been approved after the filing of the complaint and before the decision by division 1, and the report shows that consideration had been given to the resolution as well as to the interstate commerce act.

Subsequently the same complainant filed a new complaint, *California Growers' & Shippers' Protective League v. Southern Pacific Company*, 129 I. C. C. 25, in which a decision was rendered by the Commission on July 20, 1927. The Commission's report in that case shows (p. 26) that this second complaint again alleged violations of sections 1 and 3 of the interstate commerce act and further that the rates were higher than "the lowest possible lawful rates compatible with the maintenance of adequate transportation service, and . . . upon an unjust and unreasonable basis with relation to other rates" in violation of the Hoch-Smith resolution, and it is stated (p. 26) that the second proceeding presented substantially the same issues as those passed upon by division 1 of the Commission in the first case. The Commission stated in its report (p. 55), "The primary issue to be determined, therefore, is whether the $1.73 rate assailed approaches the lowest limit or level of the zone of reasonableness permitted by the flexible limit of discretion reposed in us." The finding of the Commission was that the rate of $1.73 was unreasonable to the extent that it ex-

ceeded $1.60, and that such rate was "the lowest possible lawful rate compatible with the maintenance of adequate transportation service, and necessary to promote the freedom of movement by defendants of the specified products of agriculture, now affected by existing depression in agriculture." Upon the petition of the defendant carriers for reconsideration, the finding of the Commission, on further consideration, was affirmed on November 14, 1927, 132 I. C. C. 582.

The Commission's action was reviewed by the supreme court, *Ann Arbor Railway Company v. United States*, supra, decided June 2, 1930. In the court's opinion it is said (p. 665), "The original and supplemental opinions of the Commission show quite plainly that the Commission based the order entirely upon the joint resolution" and further (p. 668), "Indeed, it is apparent from the Commission's opinions that it regarded this paragraph as requiring it to condemn the existing rates as unreasonable and unlawful, although had they been considered independently of the paragraph they must have been upheld as reasonable and lawful under the applicable sections 1 (5) and 3 (1) of the existing law."

It thus appears that in the Deciduous Fruit cases there was no doubt of the attempt of the Commission to give effect to the Hoch-Smith resolution by prescribing rates which, but for the resolution, it would not have condemned as being unjust and unreasonable. The situation presented by this case is quite different.

In this case the Commission specifically denies that it was influenced by the second paragraph of the resolution. The Commission says:

"The supreme court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the Interstate commerce act, *Ann Arbor R. R. Co. v. United States*, 281 U. S. 658, decided June 2, 1930. The findings herein are under

the provisions of the interstate commerce act." (Page 661, Commission's report R. 111).

The reports of the Commission leave no doubt that the second California Growers' & Shippers' Protective League case involved the same issues as the first case excepting only for the addition of an allegation under the Hoch-Smith resolution, and that upon this additional allegation the Commission based its decision in the second case. In the grain cases, however, the issues are not the same as between this case and the earlier cases; the records are materially different; considerable time had elapsed in which there was a change in conditions; and, finally, there is an express disclaimer by the Commission of any consideration of the Hoch-Smith resolution in reaching its determinations. Moreover, the construction of the Hoch-Smith resolution was settled by the decision of the supreme court in the Ann Arbor case while the determination of the instant case was in progress, and that the Commission took notice of the opinion of the supreme court is shown by its report herein (R. 111).

The Alleged Lack of Discussion of Evidence and of Evidentiary Findings.

The appellants complain that the report of the Commission was lacking in fullness of discussion of certain matters deemed by them to be important and that the Commission did not make findings of evidentiary facts to the extent they feel was called for by its action. It is argued, inferentially at least at page 40 *et seq.* of appellants' brief that if the Commission has proceeded under the provisions of the interstate commerce act the report would have contained a much more comprehensive discussion and findings of evidentiary facts and that the absence of sufficient discussion and findings indicates that the Commission disregarded the provisions of the act and proceeded under the Hoch-Smith resolution. As appellants concede on page 50,

of their brief, the Commission is not charged by law to make specific findings. The extent to which the Commission should discuss the evidence is left to its own judgment. However desirable it may be in the opinion of appellants or others that the Commission's reports make a full disclosure of the facts proved and the Commission's reasoning thereon, there is no ground for contending that the decision is vitiated because of the lack of discussion, nor is there any warrant for the inference that the Commission acted under any erroneous view of the Hoch-Smith resolution or otherwise than in accordance with the interstate commerce act.

In point of fact, however, the Commission's decision in this grain proceeding was unusually lengthy. The report consists of 203 pages (R. 69-272). There have been but few of the Commission's decisions reported at such length. When it is recalled that the evidence consisted of 53,000 pages of testimony and 2,100 exhibits it will be understood that the Commission did not think it practicable to make specific findings of fact in the multitudinous situations involved in the proceeding, and the practical necessities of the case will excuse the Commission from attempting this task no matter how desirable it may be deemed by appellants or others. The law does not require it, and it would seem unfair to attempt to draw any inference against the Commission.

Appellants say that the report of the Commission does not contain sufficient discussion of (*a*) the relation of the grain rates to the rates on other descriptions of traffic, (*b*) the value of the services, and (*c*) the cost of the service. There is no contention that these matters were in fact not considered by the Commission, but only that there was a failure to discuss them at length. The report, indeed, is not without some discussion of these very factors. There are many other considerations entering into the questions the Commission was called upon to determine in this proceeding, some of which were

treated in the report with fullness, others briefly mentioned, and others not referred to at all. It was for the Commission itself to determine to what extent, if at all, they should be discussed.

It is further contended by appellants that the Commission's report does not contain findings "sufficient in themselves" to support the order on any other theory than that the Commission acted upon an erroneous view of the Hoch-Smith resolution. Appellants while admitting, page 49 of their brief, that the Commission is *not required* to make specific findings of fact, contend that proper practice require it to do so, then argue that the facts reported in the decision are not sufficient to support the order under the interstate commerce act. It is a sufficient answer to say that if the law does not require specific findings of fact, there is no ground for the inference sought to be drawn that because the findings in the view of appellants are inadequate, the Commission must have proceeded under the Hoch-Smith resolution.

Comparison with Previous Decisions of the Commission Involving Grain Rates.

The carriers further undertake to demonstrate that the Commission in fact proceeded under an erroneous construction of the Hoch-Smith resolution by a comparison of the action of the Commission in this case with that taken in other grain rate cases. We have already referred to a contention that the Commission in certain earlier cases had under investigation *the entire body* of rates on grain and grain products throughout the Western District and that such cases had developed that the body of rates as a whole, without considering any particular rates specifically, had not been shown to be unreasonable. The carriers also make a comparison between this and earlier decisions involving *particular sections* of the grain rate structure as distinguished from the structure as a whole.

Reference is first made to *Ogden Grain Exchange v. Arizona*

Eastern Co., 126 I. C. C. 255, 128 I. C. C. 490, and 132 I. C. C. 46, and to *Ogden Grain Exchange v. Abiline & Southern Railway Co.*, 122 I. C. C. 691 (brief p. 63), which together dealt with the rates from southern Idaho to the Pacific coast points and to points in the states of California and Arizona and from points in southern Idaho and related points in southern Utah and near-by Montana and Wyoming points to points in Colorado, both of which were decided after this proceeding before the Commission was instituted. The entire number of rates involved in the Ogden Grain Exchange cases is relatively very small as compared with all those involved in these proceedings. The relative importance of the rates before the Commission in the Ogden Grain Exchange case depends upon the amount of grain to be shipped under such rates as compared with the entire Western District, and any governmental report of grain production will disclose the relative importance of this body of rates when compared with the Western District as a whole.

But regardless of the relative importance of these rates the carriers' argument is at fault in the assumption that the rates determined by the Commission in those cases as reasonable must be considered as reasonable in any event and under any conditions. The Commission decided those cases upon the records before it, but explicitly reserved further consideration for the more adequate record in the instant case, evidently fully realizing that such consideration might result in a different determination.

It was also natural that they should reserve for future determination in connection with the general investigation here involved the question as to what extent, if at all, the rates should be modified under the Hoch-Smith resolution; but as it turns out this case was decided after the decision of the supreme court in the Ann Arbor case, and it must be presumed that the Commission reconstructed the rates prescribed in the Ogden Grain Exchange case in making

its determination in this proceeding without reference to the Hoch-Smith resolution. The fact that upon a different record and different issues the Commission in this case found that the reasonable level of rates should be somewhat less than that prescribed in the former cases cannot be taken as proof that the lower rates were made on the basis of the Hoch-Smith resolution.

Another case referred to by the carriers (brief, p. 64), as involving a specific section of the general grain rate structure previously prescribed by the Commission is *Oklahoma Millers' League v. A. & M. Ry.*, 128 I. C. C. 523, which was followed in *Rodney Milling Co. v. St. L.-S. F. Ry.*, 147 I. C. C. 569. Both cases were decided, as contended, after this proceeding was instituted, but the decisions followed substantially *Oklahoma Corporation Commission v. A. & S. Ry.*, 101 I. C. C. 116, which case was decided prior to the institution of this proceeding.

In these cases, it is true, the Commission prescribed rates as reasonable under section 1, but upon issues and record far more narrow than those in this case. The carriers ignore the differences in issues and in records, the possible changes in conditions, and the new evidence, any or all of which might justify and require the Commission to change its determination of rates as reasonable under section 1 of the act.

It should be noticed in passing that while, as the carriers contend, the order herein would reduce the wheat rates previously prescribed in the earlier cases by approximately 15 per cent, the reduction of rates or other grain is but 2.86 per cent.

The carriers also point to the prescribed reduction of so-called "proportional rates" and contend that the action of the Commission in reducing these rates theretofore approved or prescribed as reasonable or held to be subnormal can be explained only upon the theory that the Commission was acting under the Hoch-Smith resolution.

The carriers' contention with respect to these proportional rates can be explained only by their apparent failure to understand the character of such rates. The Commission has defined a proportional rate as follows: "A proportional rate means a part of or a remainder of the through rate or it means nothing at all, and in a case of this kind there must be an examination and consideration of the entire rate from point of production to ultimate destination."* *Kansas City Transportation Bureau v. A. T. & S. F. Railway Company*, 16 I. C. C. 195, 201.

Having this definition in mind, it will be understood at once that proportional rates do not constitute a measure of reasonable maximum through rates under the standards of section 1, but the through rates of which such proportional rates are components must be considered to the end that the through rates themselves respond to the proper standards. It will also be apparent that any general revision of the grain rate structure must carry with it as a matter of course a revision of the proportional rates, as otherwise the proportional rates would lose their character as parts of through rates.

The carriers further say that the order reduces the proportional rates out of the primary markets from 14 per cent to over 50 per cent. Many of the proportional rates were out of proportion to the existing body of through rates, and to return them to a proper relationship as parts of through rates necessarily required a greater reduction in such rates than in the general body of rates. These proportional rates, in many instances, as shown, alternate with the balances of through rates, and the proportional rate or the bal-

* Proportional rates are further described by the Commission in the report herein at page 633 (R. 83) as follows: "A proportional rate is a local or joint rate dependent for application upon (1) a previous transportation to the point from which the proportional rate applies; (2) a subsequent transportation from the point to which the proportional rate applies; (3) or both. It is supposed to be a part of a through rate and is usually lower than the flat rate between the same points. When dependent upon previous inbound transportation it is applicable only upon surrender of the inbound paid freight bill showing the transportation of the shipment inbound."

ance is used, whichever makes the lower. At page 639 (R. 89) of the report herein the Commission recognized this.

"It will be seen that, because of overhead through rates, less than the rate-break combinations, the proportional rates from and between the primary markets have come largely into a state of disuse."

In reducing these proportional rates, therefore, the Commission did not reduce the going rate by the percentages indicated by the carriers, but by a substantially lesser amount, probably not different, upon the whole, than the other rates were reduced.

The proportional rates from Omaha and Kansas City to Chicago are referred to, citing *Railroad Commissioners of the State of Iowa v. Director General,* 63 I. C. C. 405, as holding that the rate of 15 cents formerly in effect was made as a result of carrier competition and to be on a basis lower than would otherwise have been justified. That case was decided in the light of the conditions then prevailing, in particular a higher general level of through rates than is provided in the Commission's report and order herein. The reduced level ordered herein necessarily must contemplate a lower proportional rate as a matter of proper relationship.

The maladjustment of these proportional rates and the extent to which they had become out of line as balances of through rates were clearly recognized after the extensive evidence on the subject, and in their rectification the Commission obviously proceeded without reference to the resolution, as evidenced in its report:

"To meet the contention, already mentioned, that through rates made on the primary market combinations are necessarily unreasonable, because of the manner of their construction, the rates herein prescribed have first been determined on a reasonable basis and, when applicable through primary markets from which there are proportional rates, broken back into flat rates to the primary markets and proportional rates beyond. The new proportional rates are better proportioned to the inbound flat rates than under the

present adjustment, and they approximate, in a general way, the average transit balances beyond the first primary markets of the through rates prescribed in Appendix D. (p. 661; R. 111.)

Expressions in the Concurring Opinions.

Finally, appellants undertake to comb the separate opinions of certain Commissioners for expressions apparently tending to show that the Commission as a body was proceeding under an erroneous construction of the Hoch-Smith resolution. In this discussion the carriers lay down the proposition that in determining the basis of the Commission's action it is competent for the court to consider the concurring or dissenting opinions of individual commissioners, citing *Southern Pacific Co. v. Interstate Commerce Commission*, 219 U. S. 433, and *St. Louis & O'Fallen Ry. Co. v. United States*, 279 U. S. 461. The proposition as stated is too broad to be supported by these authorities.

In both cases the court turned to dissenting opinions of individual commissioners to throw additional light upon the construction of the law relied upon by the Commission in those cases, and in both cases the dissenting opinions were of a character to define sharply the division of opinion in the Commission and to make clear beyond doubt the view of the majority. (219 U. S. 449, 450, and 279 U. S. 486.) No such situation is presented here—there is nothing in the separate opinions from which it can be inferred that the majority of the Commission were laboring under an erroneous view of the law. What the carriers here present to the court is nothing but a collection of fragmentary expressions which scarcely would support a mere suspicion, much less justify a definite conclusion.

Commissioner Eastman's Opinion.

Taking up the separate opinion of Commissioner Eastman the carriers endeavor to make it appear that his discussion of the law may be regarded as expressing the view not merely of himself but

of the Commission. Regardless of what Commissioner Eastman's views may be they cannot thus be imputed to the entire Commission as, obviously, if the Commission desired to adopt his expressions it could have incorporated them in the main report.

We deem it unnecessary to discuss Commissioner Eastman's opinion in detail, for even if the carriers have correctly understood his discussion of the resolution, which we are not prepared to admit, there is no slightest basis for holding that the Commission as a body entertained the same views.

Appellant further refers to the fact that neither in the main report nor in any of the separate opinions is there recorded any dissent from Commissioner Eastman's separate expression regarding the resolution, and they rely upon *Southern Pacific Co. v. United States*, supra, as authority for inferring that such absence of dissent implies agreement. Regardless of what Commissioner Eastman's views may be, the carriers' contention will not stand up. It is unreasonable to hold that any obligation rests upon the majority of the Commission to record in their report a meticulous dissent from expressions of individual commissioners. Such a rule would clearly be unreasonable and impracticable.

The Southern Pacific case was quite different from this. The dissent of Commissioner Harlan in that case raised a sharp issue of law from which the court was able to say definitely that the Commission had proceeded upon an erroneous construction. The force of this definite conclusion was not weakened, of course, by the fact that there was nothing in the main report to the contrary, but the court there was not obliged to fortify a conjectural or tentative conclusion by a failure of the Commission to record a dissenting view.

Remarks of Commissioner Meyer.

One of the things chiefly urged in this connection by the carriers is certain language used in the separate and concurring opinion of

Commissioner Meyer, who was directly in charge of the investigation of the rate structure on grain and grain products in question. Commissioner Meyer personally presided over the hearings and the taking of evidence for periods aggregating about thirty-six weeks.

To support their contention that the mind of the Commission in making its decision in the grain case was clouded by legal error and was under a misconception of the nature and extent of its jurisdiction and powers in the prescription of the new grain rates, the carriers have referred to an expression of Commissioner Meyer found in his concurring opinion on page 700 (R. 150) of the report reading as follows:

"The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed."

The carriers assert this expression to indicate that Commissioner Meyer and the Commission proceeded in the making of the decision on a wrongful interpretation of the Hoch-Smith resolution which contains the words "the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Commissioner Meyer joined, however, in the report unanimously adopted by all the members of the Commission. We suggest it would be appropriate to note the expressions in the main report as to the legal basis upon which it is founded.

On page 627 (R. 77) the Commission says (the italics are ours):

"The question here presented is whether, under present conditions, the rates on grain and grain products throughout the Western District are *reasonable* and *just* and are properly related to each other and to the rates on other traffic."

On page 661 (R. 111) of its findings the Commission says (the italics are ours):

"We find that the present rates on wheat and coarse grains and their products are *unreasonable* and *unduly preferential* and *prejudicial* to the extent they exceed the rates prescribed in Appendix D,

to be applied in accordance with the previous discussion herein as to rate break, relation of commodities, transit, etc., and subject to the later discussion herein of general issues or specific adjustments.

"We further find that rates between points between which rates have not been prescribed, specifically or by reasonable relation, are *unreasonable* to the extent they exceed rates made on the basis of the so-called interior scales shown in Appendix D."

It will be noted that the terms *reasonable, unreasonable* and *just* are to be found in sections 1 and 15*a* of the interstate commerce act. The terms *unduly preferential and prejudicial* are to be found in section 3 of the act.

On page 661 (R. 111) the Commission further states:

"The supreme court of the United States recently interpreted the Hoch-Smith resolution as setting up no standard of reasonableness of rate level or relation other than that already provided by the interstate commerce act. *Ann Arbor Railroad Company v. United States,* 281 U. S. 658. The findings herein are under the provisions of the interstate commerce act."

The carriers contend that despite the positive avowal by the Commission that the findings in the report were made under the provisions of the interstate commerce act, and not under the Hoch-Smith resolution, the language of Commissioner Meyer in his concurring opinion above quoted nevertheless establishes not only that the rates prescribed were based on the Hoch-Smith resolution, but that they were founded on an erroneous conception of the meaning of that resolution condemned by the supreme court of the United States: namely, that the words in the resolution "the lowest possible lawful rates" were taken by the Commission in its report and order to establish a new and different standard of reasonableness than that laid down in sections 1 and 15*a* of the interstate commerce act.

When the true background and the surrounding circumstances of the Commission's investigation and report respecting the grain rates are clearly understood, we think the words of Commissioner Meyer,

"the lowest rates on this traffic which can be lawfully prescribed," indicate a conception in the mind of the Commission itself and of Mr. Meyer directly opposite in meaning from that attributed by the carriers to the expression used. A large mass of evidence was introduced in the record to show that a depression existed in agriculture. A pressure was thus exerted on the Commission to bring about a lower future level of rates on grain and grain products. This elaborate presentation made at the hearings in behalf of the farming interests, affords the key for the true interpretation of what was in the mind of Commissioner Meyer when he employed the expression "the lowest rates on this traffic which can be lawfully prescribed."

Respecting the evidence on agricultural conditions, the Commission says on page 626 (R. 76) of its report:

"Voluminous testimony concerning conditions in agriculture, especially as affecting the wheat farmer, was offered by witnesses called on behalf of both shippers and carriers. These witnesses included farmers and representatives of farm organizations in Kansas, Oklahoma, Nevada; North Dakota, South Dakota, Minnesota, Idaho, Montana, Oregon, Washington, and other states, and men engaged in governmental, banking, scholastic, and other contacts with agriculture, some of whom we invited to give their impartial views. The range of the evidence of these witnesses covered, as of the period from immediately preceding the World War down to the then present dates, (1) the general trend of production costs and prices, and the purchasing power of the dollar, as tested by socalled indexes used in governmental and other reports; (2) bank failures, decline in hand values and wheat prices, crop failures, abandonment of farms, and increases in farm and chattel mortgages in agricultural districts; and (3) general impressions of individuals concerning agricultural conditions as a whole within their personal observation. This evidence is summarized and commented on in detail in Appendix C. It is sufficient to say here that while conditions affecting the grain farmer had been improving within the few years immediately preceding the hearing herein there is still depression in the grain industry."

Here the Commission itself frankly emphasizes the testimony put into the record by the farming interests. It should be noted in pass-

ing that this evidence was not limited to the testimony of farmers and representatives of farm organizations, but also embraced men engaged in governmental, banking, scholastic, and other contacts with agriculture, some of whom were invited by the Commission to give their impartial views. Nevertheless, let it be frankly stated by us and fully realized by the court that a great volume of evidence was presented in the record by agricultural interests demanding a severe reduction in the level of the grain rates, for that very atmosphere surrounding the investigation supplies the true interpretation of what Commissioner Meyer meant when he said the rates prescribed are "the lowest rates on this traffic which can be lawfully prescribed." His remark is in truth a statement of the reason why the Commission could not grant the demands of the farming interests as these interests pressed the language of the Hoch-Smith resolution upon the attention of the Commission. Commissioner Meyer by the expression quoted from his concurring opinion was saying to the farmers and their representatives in substance the following: You are insisting on a special and lower level of rates for agriculture by virtue of language in the Hoch-Smith resolution. This request is beyond the power of the Commission to grant you. The language in the resolution has been interperted by the supreme court of the United States. Under that interpretation no new standard of reasonableness of rates was created by the Hoch-Smith resolution. The provisions in the interstate commerce act relating to the reasonableness of rates are unmodified and are supreme and binding upon us. The Commission has therefore been obliged to prescribe the new rates on the criteria of reasonableness embodied in the interestate commerce act prior to the passage of the Hoch-Smith resolution. The Commission can therefore lawfully make no lower rates for agriculture than those which must result under the provisions of the interstate commerce act. Your evidence and contentions have had

our attention, but the rates as we have made them are the lowest rates on this traffic, despite the fact it is agricultural traffic, which can be lawfully prescribed.

The frame of mind of the carriers in this case is indicated by the following, found on pages 103 and 104 of their brief in this court:

"Commissioner Meyer, whom the report shows to have been the Commissioner in immediate charge of the proceeding, said:

" 'The rates prescribed lie within the zone of reasonableness, but they are the lowest rates on this traffic which can be lawfully prescribed.' (R. 140).

Later on, answering the demand of certain interests for reduction in the export rates, the commissioner says:

". . . But even if they had produced the desired effect we would still be without power to compel the railroads to publish them unless the rates fell within the zone of reasonableness. It is my understanding that many of these rates were established on a level below that zone. Whatever the facts may be in this regard, we are establishing herein rates as low as we can lawfully prescribe. . . . (R. 153.)

"Commissioner Meyer thus twice characterized the rates prescribed as the lowest possible lawful rates."

The carriers do not quote Commissioner Meyer with accuracy. What he says in the first quotation from his separate opinion above set forth is that the prescribed rates "are the lowest rates on this traffic which can be lawfully prescribed." In the second quotation from his opinion he says "we are establishing herein rates as low as we can lawfully prescribe." But in commenting on these expressions the carriers say that Commissioner Meyer thus twice characterized the rates prescribed as "the lowest possible lawful rates." The expression employed by Commissioner Meyer was not, however, "the lowest possible lawful rates," which is the verbatim language of the Hoch-Smith resolution. He used language conveying a distinctly different idea when he in fact said that the rates prescribed "are the lowest rates on this traffic which can be lawfully

prescribed," and "we are establishing herein rates as low as we can lawfully prescribe." We do not think that the carriers intended in their brief to pervert the expressions of Commissioner Meyer. But that brief shows that the carriers have become permeated with the idea that the mind of the Commission and of Commissioner Meyer was so thoroughly infected with error respecting the true meaning of the Hoch-Smith resolution that it was unable in the face of a decision of the supreme court of the United States to purge itself of this error in the making of the decision in the grain case. It is evident that the carriers in viewing the Commission's decision were so disturbed by the anticipated reduction in their revenues that they have been unable to perceive with clarity the direct declaration and the unmistakable indications in the Commission's report that in making its decision in the grain case it gave full heed to the holding of the supreme court in *Ann Arbor Railroad Company v. The United States* expounding the correct interpretation of the language of the Hoch-Smith resolution.

The supreme court in the Ann Arbor case did not obliterate the language of the Hoch-Smith resolution, but merely interpreted it. It simply said that the language in the resolution, "the lowest possible lawful rates compatible with the maintenance of adequate transportation service," did not change the existing standards of reasonableness laid down in sections 1 and 15*a* of the interstate commerce act. Commissioner Meyer did not in fact in his separate opinion employ this verbatim language of the resolution, but assuming that his expressions were prompted by the presence of this language in the resolution, why should it be assumed that he was speaking with an erroneous conception of their true meaning as interpreted by the court? If the supreme court of the United States can as a matter of judicial interpretation consider the phrase in the resolution "the lowest possible lawful rates" and regard it as indi-

cating no new standard of reasonableness aside from those already embodied in sections 1 and 15a, why may not Commissioner Meyer and the Commission itself refer to these words in the resolution without any imputation that their minds are, despite the supreme court interpretation, afflicted with error as to their true legal meaning? The supreme court did not place a taboo on the expression in the resolution "the lowest possible lawful rates compatible with the maintenance of an adequate transportation service." The effect of its decision in the Ann Arbor case is not to assign these words as among the "unmentionables" in polite legal circles. Yet the carriers seem to think that the Commission's legal conceptions and expressions must be held to be tarnished if it so much as ventures to mention these words of the resolution in a published report.

Other Commissioners' Separate Opinions.

The carriers also refer to the separate opinions of certain other commissioners, but they need not be discussed here beyond the remark that the expressions referred to by the carriers make very clear the speculation and suspicion in which the carriers have indulged.

The language of all the opinions, taken as a whole, as it must be, provides no ground whatever for the carriers' contention.

Overemphasis of Section 15a as Engendering Legal Error.

It is a strange thing that appellants should complain that the Commission, in the grain decision here under review, gave the Hoch-Smith resolution an erroneous preëminence in reaching its conclusions, and that they should now come into this court and insist that section 15a shall be given the same sort of preëminence so as to inundate all other parts of the interstate commerce act, by urging as they do in their brief in the district court, and by reasserting here, that section 15a "is the keynote of the whole scheme of rate

regulation embodied in the interstate commerce act as it now reads" and that it is "the corner stone of the existing system of regulation as created by congress." In its decision in the Ann Arbor case the supreme court of the United States strongly condemns attempts to give predominance to one section of the act over another. It reversed the Commission in that case because it so treated the Hoch-Smith resolution. The carriers now insist that the Commission in the grain case should have repeated this sort of error by elevating into supremacy the single factor of reasonableness in section 15a relative to the net return. On page 665 of the opinion of this court in the Ann Arbor case we read:

"The original and supplemental opinions of the Commission show quite plainly that the Commission based the order entirely upon the joint resolution. It is said in the opinions that 'the joint resolution was primarily relied upon' by the complainant; that while a violation of section 3 (1) of the interstate commerce act was alleged in the complaint 'no great reliance was placed upon that allegation'; that the 'primary issue to be determined' was whether the existing rates were in accord with the resolution; that the resoluion effected a change 'in the basic law'; and that this change operated to eliminate a decision made June 25, 1925, in another proceeding between the same parties wherein the Commission found the same rates neither unreasonable nor unduly preferential and sustained them as lawful rates, 100 I. C. C. 79. True, in both the original and supplemental opinions it is said that the existing rates are unreasonable, but the opinions taken as a whole show that this means the rates were deemed unreasonable under the joint resolution when construed as the Commission construed it, and not that they were deemed unreasonable under section 1 (5) or section 3 (1) of the interstate commerce act. Throughout the opinions it is manifest that the Commission was testing the reasonableness and validity of the rates by considerations not applicable under those sections but relieved by it to have been brought into the problem by the resolution."

In the case at bar the carriers are now urging that section 15a is to be "primarily relied upon" and that the "primary issue to be de-

termined" is the matter of the net return to the carriers, while the whole tenor of this court's opinion in the Ann Arbor case is to the effect, as we have been earnestly contending herein, that the factors of reasonableness and relationship of rates embraced in all three of sections 1, 3, and 15*a* should be balanced and weighed together by the Commission in reaching its conclusion.

While we are on the subject of the decision of this court in the Ann Arbor case we should like to point out that it seems to us that this case clearly recognizes in principle the inherent lack of power on the part of the Commission through the sole medium of freight rates to mold, resist, or overcome the natural and all-powerful forces of economics and trade in the effort to attain the ideal of the allotted net return. The words which the supreme court applied to the aspirations of the framers of the Hoch-Smith resolution for bringing about the "lowest possible lawful rates" on agricultural products might well be perused, as it seems to us, in reflecting upon the true meaning of section 15*a*. On page 668 this court said:

"Considering the connection in which these words are brought into the sentence, we think they fall much short of supporting the construction adopted by the Commission. They are more in the nature of a hopeful characterization of an object deemed desirable if, and in so far as, it may be attainable, than of a rule intended to control rate making. See *United States v. New York Central R. R. Co.*, 263 U. S. 603. Of course, they should not lightly be disregarded."

In like manner the provision in section 15*a* as to the fair return "should not lightly be disregarded"; nor is there any real evidence in the case at bar that it has been. The bringing about of the net return is "an object deemed desirable if and in so far as, it may be attainable." The Commission is required to give all due and proportionate attention to the attainment of this object in conjunction with other objects of justice and fair dealing enjoined by the interstate commerce act. But the object of the fair return is not

to be elevated to unqualified supremacy, nor can it reasonably be supposed that its achievement is to be attempted in defiance of the natural laws of business and commerce.

The Commission's Denial of Petitions for Rehearing.

The carriers argue that the Commission, in denying their petitions for rehearing of these proceedings, acted either upon an erroneous conception of its powers and duties under the Hoch-Smith resolution or deliberately and willfully disregarded section 15*a*, and its action was therefore so arbitrary and unreasonable as to render its order void. While conceding that granting or denying a petition for rehearing is a matter for the discretion for the Commission, they contend that the circumstances in this instance are such that the Commission was not justified in denying the petitions.

The carriers' contention appears to be disposed of by *Virginian Ry. Co. v. United States*, 272 U. S. 367. In that case the Virginian Railway contended, among other things, that the order of the Commission should be set aside because of facts which occurred after the original order was made. In the Virginian case the proceedings before the Commission began May 15, 1922, and did not close until February, 1923. The proposed report of the examiner was served April 30, 1924, and the original report filed on March 10, 1925.

An agreement, during the pendency of the proceeding, was made to lease the Virginian to the Norfolk & Western for 999 years. In anticipation of approval by the Interstate Commerce Commission of the agreement, the Virginian and the Norfolk & Western established and published through routes and joint rates from substantially all mines on the Virginian to markets in the West.

The Virginian filed, on April 25, 1925, a petition to reopen the case and modify its order so that the routes which had been opened via the Norkfolk & Western in partial compliance with the order

should be accepted as the equivalent of full compliance and the requirements of routes and rates via the Chesapeake & Ohio should be eliminated. The petition for rehearing was denied May 11, 1925.

The Virginian contended that, in view of these facts, the order requiring transportation service also via the Chesapeake & Ohio was so unreasonable as to transcend the limits of the Commission's discretion, among other reasons because through the duplication of routes not available to mines served only by the Chesapeake & Ohio and the Norfolk & Western, respectively, it would give to mines on the Virginian an undue preference and advantage.

Mr. Justice Brandeis said: "The argument urged in this connection is appropriate for consideration by the Commission and has presumably been duly considered by it. The fact that it has not proved persuasive affords no basis for the contention that the Commission's action in making the order was arbitrary or otherwise illegal."

In the instant case it is contended by the carriers that the Commission acted arbitrarily and in violation of its duty in not granting a rehearing and reopening of the case based upon its petitions and correspondence of executives. The Commission considered those matters, but apparently the Commission within its judgment and experience was not persuaded thereby and denied the petitions. Its judgment therein was entirely based upon the record and the law, and it can afford no ground for the carriers to say that it acted arbitrarily or illegally; and after giving the carriers' application for rehearing due consideration, which the law definitely presumes it did, it cannot be said that its decision was illegal and that the Commission violated its statutory duties, as was definitely held by Mr. Justice Brandeis as above set forth.

The carriers by reference to their petitions for rehearing and the correspondence between the Commission and the presidents of the

railroads attached as exhibits to the bill of complaint have brought before the court a number of alleged facts as to changes in the financial condition of the carriers since the close of the record before the Commission. They emphasize the facts thus disclosed as tending to support their contention that the Commission's action in denying the petitions for rehearing was arbitrary. Our contention, as stated above, is that this entire matter is completely disposed of as being exclusively in the discretion of the Commission under the authority of the Virginian case and that it is immaterial whether the facts alleged are true or not. To perceive the lack of justification for the carriers' charge that the Commission's action is arbitrary, it is only necessary to take into account that in all probability the forces which have operated to change the carriers' financial condition have also operated to alter many other factors which the Commission is obliged to take into account in the determination of reasonable rates.

Matters Outside the Record.

The carriers complain that the Commission's report contains data not in the record before the Commission. Upon examination, however, there seems to be no substantial basis for the complaint. The matters referred to are discussed below:

1. Certain checks and estimates. The carriers do not contend that the basic data were not in the record. Presumably these checks and estimates are mere calculations from documentary material and, therefore, cannot be considered objectionable.

2. The carriers' rate of return for 1928. This matter was not shown to be material by the carriers, but the data appears to be properly in the record. The figure was used in the examiners' tentative report and at the oral argument without objection by the carriers.

The Shifting Contention of Appellants.

On page 82 of the brief of appellants in this court, we read:

"The effect of the order is materially to reduce the general level of the rates on a major description of traffic without any finding that the carriers' rate of return was, or in the near future would be, in excess of that contemplated by section 15*a*, but, on the contrary, at a time when such rate of return was materially below the statutory requirement, and *without any finding*, or basis for finding, that such reduction would result in increased revenues through stimulating an increased volume of traffic." (Italics ours.)

We direct the attention of the court to the progressive variation in the carriers' theory as it is revealed by a tracing through of their original and reply briefs in the district court and their brief in the supreme court. In the first portion of their main brief in the district court they flatly assert that under section 15*a* the Commission may not reduce rates on a substantial body of traffic over an extended area where the carriers are not receiving the allotted return. Later in the same brief appellants appear to modify this contention somewhat by affirming that, when the carriers are failing to receive the net return, the Commission may not reduce the rates from a higher to a lower stratum in the "zone of reasonableness." Further emphasis is given to this proposition in the reply brief in the district court. In their brief in the supreme court the carriers seem to wish still further to modify their thesis by contending that at least such rate decreases may not be lawfully ordered by the Commission *without a specific finding* that such reductions will increase the volume of the traffic on grain and grain products and the revenues of the carriers flowing therefrom. In their brief in this court they lay great emphasis on the contention that the Commission cannot lawfully prescribe "the lowest possible lawful rates," where the rates in the absence of the net return already lie within the "zone of reasonableness." This progressive abridging, shading and coloring of the orig-

inal theory of the carriers upon which their petition and initial presentation were based offer in our view strong indications of the essential unsoundness of the grounds and reasons which inspired the institution of this case.

The court will not fail, we believe, to perceive that the appellants, in asserting that the Commission reduced rates on grain and grain products which were already reasonable (as the carriers conceive and interpret the surrounding facts, circumstances and conditions), are doing nothing less than asking that their opinion be substituted for the administrative discretion of the Commission.

The decision of the district court should be affirmed.

Respectfully submitted,

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